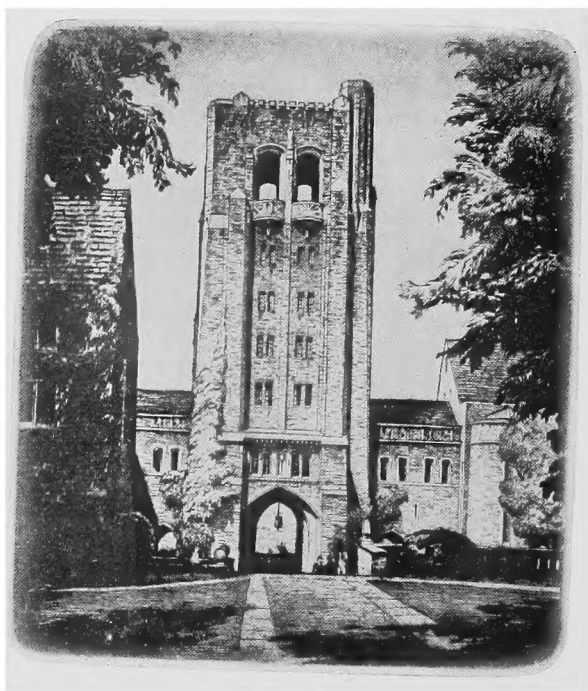


KF  
9085  
M88



Cornell Law School Library

Cornell University Library  
KF 9085.M88

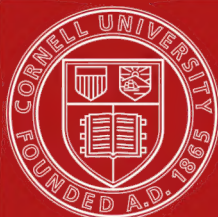
The law of arbitration and award /



3 1924 020 139 121

law





## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.



THE LAW  
OF  
ARBITRATION AND AWARD.

BY  
JOHN T. <sup>o. REY</sup>MORSE, JR.,

AUTHOR OF "LAW OF BANKS AND BANKING."

BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1872.

*B 13734.*

Entered according to Act of Congress, in the year 1872, by

JOHN T. MORSE, JR.,

In the Office of the Librarian of Congress at Washington.

CAMBRIDGE:

PRESS OF JOHN WILSON AND SON.

## P R E F A C E.

---

THE tendency among business men to avoid the public tribunals and to settle their disputes by arbitration before individuals of their own choosing is growing stronger year by year. Not unnaturally they feel that they can obtain a more intelligent and satisfactory, as well as a more prompt, determination from eminent lawyers or merchants whom they select, and in whom they feel confidence, than they can venture to expect from an average jury. This being so, the law concerning arbitration and award is necessarily assuming a more important position than it has ever before held. For, though a reference by agreement of parties fails of its chief end when it results in a lawsuit, yet it must not unfrequently happen that some real or supposed error or unfairness in the proceedings or the judgment will induce the party feeling himself aggrieved to have recourse to litigation in order to free himself from the consequences of his own undertaking.

No work on arbitration and award has ever been prepared in the United States, and the decisions of our courts are to be discovered only by the use of the digests and similar sources of knowledge. In England,

Kyd and Caldwell and others of the older writers who rather made than collated the law, have grown antiquated. The admirable work of Mr. Russell has superseded these earlier text-books, and is now the acknowledged authority. It is impossible to praise this book beyond its due. It is learned, full, accurate, and reliable. The treatment of the subject is based upon singularly clear and logical divisions. That it has not been so widely known and used in this country as its foreign reputation would have rendered natural is probably due to the fact that about one-half of it is so closely connected with English statutory law and with the practice in the English courts as to be useless to the American lawyer.

In writing this book I have made free use of the fruits of Mr. Russell's labors, and I think that I have omitted nothing contained in his pages which could be of use to the professional man in the United States. This alone ought to ensure no inconsiderable value to the work. Concerning my own more original labors in the collection of American adjudications, in extracting from them the principles of the law, and bringing them into their proper connection, I can only say that I have spared no means which were at my disposal for rendering the research exhaustive. I should be disappointed to find that there were many substantial omissions, though in the thousands of volumes of American reports I am aware that some cases must doubtless remain buried where I have not discovered them. The decisions of the courts of Massachusetts on this topic take a very high place. I think that no tribunal in

England or the United States can furnish any thing in this department of the law of greater value. While that eminent jurist, Chief-Justice Shaw, was upon the bench, nearly all the opinions in this class of cases emanated from his pen, and it was a subject in respect of which he evinced a peculiar mastery. His opinions are essays, elaborate, lucid, and convincing. I have made extensive extracts from them, since I have found no other authority so thoroughly satisfactory.

I have added no appendix of forms to aid in drafting submissions, awards, &c., for the reason that this assistance seemed to me wholly needless. All these documents, so far as matters of formality go, are such simple instruments that a layman could hardly go wrong in drawing them, and no lawyer could need guidance. In matters of substance, on the other hand, where errors are more naturally made, no general form could be of real use. Mr. Russell's forms are drawn with reference to elaborate English statutes and rules of practice which call for a considerable amount of technical precision. No similar necessity exists among us.

I ought further to acknowledge my indebtedness to the Hon. J. C. Perkins, of Salem. This gentleman had already begun to labor upon a work on this topic, when the idea of writing this book occurred to me. The multiplicity of the Judge's engagements, however, both in the practice and in the literature of the law, made the progress of his contemplated book rather slow. He therefore very kindly withdrew from the task in my favor; and not only this, but with great generosity he

furnished to me all his notes and the fruits of his labors so far as he had been able to prosecute them. For this liberal conduct he justly commands my warm and publicly expressed gratitude.

JOHN T. MORSE, JR.

16, PEMBERTON SQUARE, BOSTON,  
May 21, 1872.

# TABLE OF CONTENTS.

---

TABLE OF CASES . . . . .	PAGE xxv-lxxi
--------------------------	------------------

---

## PART I.

### PARTIES—THE SUBMISSION.

#### CHAPTER I.

PARTIES TO THE SUBMISSION . . . . .	3-34
-------------------------------------	------

- Must be competent to contract.
- Must have Power in relation to the Subject-matter.
- Infants.
- Corporations.
- Selectmen.
- Overseers of the poor.
- Partners.
- Agents.
  - 1. Principals not bound.
  - 2. Principal bound, originally;  
or by subsequent proceedings.
  - 3. The Agent personally bound.
- Incidental powers of Agent authorized to submit.
- Submissions by Counsel in *lis pendens*.
- Executors and Administrators.
- Guardians.
- Husband and Wife; Married Women.
- United States District Attorney.
- Assignees in Bankruptcy.
- Bankrupts.
- Persons having a Joint Interest.
- Persons bound in Severalty.
- Parties to a *lis pendens*.
- Duress.



## CHAPTER II.

## THE SUBMISSION . . . . . 35-88

Submission.

What constitutes a basis for a submission.

Purely ministerial acts are not such basis; *e. g.* appraisals, valuations, &c.

Other cognate cases.

Matters of recollection.

Contracts to submit, *in pais* and statutory.

Submissions intended to be statutory, but defectively or carelessly framed.

Superfluous formality.

Upholding submissions according to apparent intent.

The presumption is always favorable to validity.

Reference by rule of court and consent of parties.

Manner of submitting, orally or by writing, &c.

Formalities and characteristics of the submission.

What may be the subject-matter of a submission.

1. Disputes of a civil nature only.

2. Dower.

3. Owelty.

4. Ejectment.

5. One item in account.

6. Actions on penal statutes.

7. Questions of pure law.

8. Regulation of future rights.

Submissions concerning real estate.

boundary lines.

nicely construed.

Construction of statutes concerning submissions.

Rules for construing submissions.

Construction of uncertain or indefinite submission.

Written submission is invariable and final.

Submission will not be stretched by forced construction.

Sundry specific cases of construction.

General submission.

Conditional submissions.

When a reference will be construed to have become changed into a submission.

Submission of a "cause."

1. Its extent and operation on the pleadings.

2. Its operation on previous errors.

May be made to include other matters.

Submission of separate actions.

Effect of a submission in a pending cause upon the *status* of the cause.

upon the right of action.

Making submission a rule of court, and agreeing for entry of judgment on award.

References in cross-actions

Alteration of the submission.

Extension of time for award, named in submission, by new agreement.

Substitution of new arbitrator or referee.

Enlargement of rule of reference.

Suit upon an altered agreement to submit.

Correction of errors in submission.

How long the submission will remain in force.

Stipulations in submission to waive appeal from award.

"to abide by" an award.

## CHAPTER III.

## AGREEMENTS TO SUBMIT . . . . . 89-96

No specific performance granted in equity.  
 Liability of party refusing.  
 Agreements to refer embodied incidentally in other contracts.  
 Agreement to refer, as condition precedent to right of action.  
 Pleadings.  
 Damages for refusal to refer according to agreement.  
 Breach of bond.

---

## PART II.

## THE ARBITRATOR.

## CHAPTER IV.

## THE OFFICE OF ARBITRATOR . . . . . 99-113

Who may be an arbitrator.  
 Disqualifications.  
     1. Interest.  
     2. Relationship.  
     3. Preconceived opinion.  
 Waiver of objection on any of the aforesaid grounds.  
 Time, etc., of availing of objection on the aforesaid grounds.  
 A party may be also an arbitrator.  
 Judge of court as referee.  
 Arbitrators are agents of the parties.  
 They must be impartial agents of both parties alike.  
 Impartiality is a fundamental requisite.  
 Officials as arbitrators.  
 Public commissioners are amenable to the court.  
 Absence of person named as arbitrator.  
 Administration of oath to arbitrator.  
 Statutory provisions concerning arbitrator's oath.  
 Effect of neglect to administer oath.  
 Form of oath.  
 Dispensing with oath.  
 Presumption concerning the oath.  
 Pleadings concerning the oath.  
 Swearing the umpire.

## CHAPTER V.

## PROCEEDINGS IN THE ARBITRATION . . . . . 114-175

- The arbitrator controls the mode of conducting the reference.
- The arbitrator must appoint the time and place for hearing.
- Parties entitled to be present.
- Notice of hearing must be given to each party.
- Of what meetings notice need be.
- Notice after choice of third arbitrator.
- No notice to surety.
- Notice to attorney of party.
- Revocation of appointment for hearing.
- Sufficiency of notice.
- Waiver of notice.
- Non-attendance of party after notice.
- Parties must have time to examine written evidence.
- Pleading concerning notice.
- Availing of the objection of want of notice.
- Exceptions to rule requiring notice.
- Ex parte* hearings.
- Private statements and examinations.
- Duty of party objecting to private examination.
- Curing objection on ground of improper receipt of evidence.
- Attendance of counsel, advisers, &c.
- Arbitrator's discretion to hear counsel.
- Arbitrator's right to call in counsel.
- Administration of oaths to witnesses.
- Unauthorized administration of oath.
- Parties may dispense with the oath.
- Arbitrator's power to force attendance of witnesses and production of documents.
- Protection of witnesses.
- Rules governing arbitrator respecting admission of evidence.
- His decision is final.
- Rejection of evidence under mistake concerning the scope of the submission.
- Erroneous ruling on evidence by a referee.
- The referee may leave the question of admissibility to the court.
- A referee need not report evidence.
- Parties may be admitted as witnesses.
- Arbitrator's discretion to refuse to hear evidence.
- Number of witnesses.
- Closing case too hastily.
- Opening case for new evidence.
- Admission of evidence *de bene esse*.
- Adjournments are in arbitrator's discretion.
- Adjournments before referee in *his pendens*.
- Death of witness during adjournment.
- Record of adjournment.
- Causes for demanding adjournment.
- Erroneous refusal to adjourn.
- Adjournments in case of absence.
- All the arbitrators must act together during the proceedings.
- Withdrawal or refusal of an arbitrator to act with his fellows.
- The refusal or withdrawal must be distinct and final.
- But it need not be formal.

Rule where a third arbitrator is called in.	
Withdrawal or refusal before the proceedings are begun.	
Refusal or withdrawal after recommitment.	
Silence of award concerning joint action.	
The rule that all the arbitrators must unite in the award.	
Award by majority.	
The rule concerning referees.	
Time of expressing dissent.	
Unanimity in each incidental question is unnecessary.	
Process of coming to agreement.	
Some judicial discretion must be exercised.	
Delegation of authority by an arbitrator, and agreements to accept the decision of another.	
Delegation of purely ministerial acts or functions.	
Waiver of right to object for incompetency or irregularity.	
by appearing and proceeding.	
of stipulation as to time.	
is matter of apparent intention.	
of stipulations concerning the form of the award.	
by ratification and performance.	
of departure from the scope of the submission.	

---

## CHAPTER VI.

### THE ARBITRATOR'S AUTHORITY. . . . . 176-222

Source of the arbitrator's authority.	
The arbitrator's action in excess of his authority.	
Favorable presumptions.	
General rules concerning an arbitrator's authority.	
The arbitrator cannot go beyond the precise question submitted.	
The arbitrator cannot modify the question submitted.	
The arbitrator cannot do general equity.	
Orders concerning price and payment.	
Orders concerning allowance of interest.	
The arbitrator's power in disputes between partners.	
Power of arbitrator to order execution of a release.	
Power to order conveyance of real estate.	
Specifications concerning legal form, &c., of the conveyance.	
When conveyance need not be ordered.	
Power of arbitrator in cases of land-damages.	
Power to go behind a receipt in full.	
Orders concerning incidental matters.	
Power and duty to order what shall be done by a party in the future.	
Validity of orders concerning future conduct of a party.	
Orders concerning future acts will be sustained if possible.	
Limitation of authority as to time past.	
Orders concerning the persons and property of strangers.	
Order that an act be done by a stranger.	
Other non-enforceable orders.	
Effect of performance of such non-enforceable orders.	
Reference of cross-actions.	

Arbitrators cannot name substitute.	
The arbitrator's power in a <i>lis pendens</i> .	
The arbitrator's power to allow amendments where the submission is in or of a <i>lis pendens</i> .	
Limitations upon the power to allow amendments by the plaintiff.	
Limitations upon the power to allow amendments by the defendant.	
Power to consider a claim in offset.	
The allowance of amendments is discretionary.	
Who may object if the arbitrator exceeds his authority.	
How the objection of excess of authority may be availed of; rules of pleading.	
Evidence as to excess of authority.	
The arbitrator is the final judge of both law and fact.	
Whether or not the arbitrator ought to conform to strictly legal principles.	
Power of arbitrator to save questions of law for the court.	
An arbitrator may consider defences not strictly legal.	
Rules of court practice.	

---

## CHAPTER VII.

### DURATION OF THE ARBITRATOR'S AUTHORITY . . . 223-240

When the duration of authority is limited by the submission.	
Construction of specific phrases.	
When the submission or rule is silent as to time.	
Exhaustion of authority by making an award or report.	
Effect of vacating the award.	
An arbitrator cannot refuse to deliver his award.	
Exceptions to the foregoing general rule.	
Revocation in fact and in law.	
I. Revocation in fact.	
Time for making revocation by a party.	
Stipulation that the submission shall be irrevocable.	
Revocation by one of several who jointly constitute only one party.	
Revocation by joint consent of both parties.	
The revocation must be notified.	
When the right of revocation does not exist.	
The revocation of reference by rule of court.	
Formality of revocation by a party.	
II. Revocation in law.	
1. By death of party.	
2. By death of an arbitrator.	
3. By marriage of a <i>feme sole</i> , a party.	
4. By lunacy of a party.	
5. By arbitrator's refusal to act.	
6. By the institution of a suit.	
7. By neglect to perform a preliminary act.	
Revocation through the instrumentality of a stranger.	
Revocation by Congress.	
Revocation by an agent.	
Damages may be claimed for revocation.	
The measure of damages.	
Pleading revocation.	
Effect of submission ceasing to bind a party.	

## CHAPTER VIII.

## THE UMPIRE . . . . . 241-248

The functions of umpire and of third arbitrator distinguished.

Appointment—1. How to be made.

2. When may be made.

Effect of appointment of umpire on power of arbitrators.

Whence arbitrators derive power to appoint an umpire.

They may make several nominations.

Parol appointments.

Evidence of umpire's authority.

Umpire's duty as to re-hearing parties.

Construction of a submission.

## PART III.

## THE AWARD.

## CHAPTER IX.

## THE FORMALITIES AND CONTENTS OF THE AWARD . 251-290

No especial form, if a decision be expressed.

The fact of decision need not be declared.

Decision by implication.

Oral awards.

Stipulations for a written award.

Award concerning real estate.

Award concerning boundary lines.

Attesting witness.

Seal.

Instructions of submission must be followed.

Stipulations construed as conditions precedent.

Award under statute must comply with the statute.

But may be upheld if it does not so comply.

Strict compliance may be waived.

Award may be of a sum in gross.

Or may be of each item separately.

What the award must contain.

Award need not order release nor discontinuance.

Award of a nonsuit.

Some peculiar forms of awards by means of promissory notes.

Professional assistance in drawing award.

Recitals of the submission and proceedings in the award.

Erroneous recitals.

Referee need not report evidence.

Stipulations for delivery of the award.

Delivery must be of the original award.

Delivery in duplicate.  
 Waiver of actual delivery.  
 To whom delivery is to be made.  
 What constitutes delivery.  
 Delivery of an oral award.  
 Pleading delivery.  
 How non-delivery is to be availed of.  
 Publication of the award.  
 Possession of award.  
 Neither party is bound to notify the other of the award.

---

## CHAPTER X.

### MISTAKE IN THE AWARD . . . . . 291-338

Inconsistency of judicial decisions.  
 Two classes of decisions.  
 Conclusiveness of the arbitrator's decision, both in law and fact, asserted by C. J. Shaw.  
 This doctrine is generally acknowledged.  
 A general submission constitutes arbitrators final judges of law and fact.  
 Cases establishing the finality of the arbitrator's finding in matter of law.  
 Exception to the broad principle, in matter of law.  
 The exception covers two classes of cases.  
 Insertion of restriction in the submission.  
 The award may give the court the right to interfere for a mistake in law.  
 Statement by the arbitrator of an intention to be governed by law.  
 The decisions in Vermont.  
 Statement of grounds, &c., of decision in the award.  
 The rule in this matter in England.  
 Suggestion of a distinction.  
 Effect of a recital of facts in the award.  
 The statement of grounds, &c., must constitute a part of the award.  
 The fundamental matter is the arbitrator's intent.  
 Error in a fundamental and clear principle of law.  
 Awards on questions of pure law.  
 Distinctions between professional and non-professional arbitrators.  
 Matters of fact are peculiarly within the arbitrator's authority.  
 Exception where the judgment has been prevented from being fairly or correctly exercised.  
 Mistake of an arbitrator as to contents of award.  
 The general doctrine that a mistake is ground for vacating an award.  
 The English authorities supporting this doctrine.  
 The case of *In re Hall & Hinds*, and comments upon it.  
 Mistakes of the arbitrator on his own principles.  
 Objection that the award is against evidence.  
 Clerical errors, blunders in calculation, &c., in the award.  
 The court cannot alter a report or award.  
 Variance in duplicate awards.  
 Method of availing of an alleged mistake.  
 Recommitment for correction of acknowledged errors.



Recommitment for re-hearing.	
Recommitment for errors in form.	
Recommitment for costs.	
Power and duty of the arbitrator after recommitment.	
Recommitment is for the discretion of the court.	
Recommitment must be of the whole case.	
Impeaching the award by extrinsic evidence, or by the arbitrator's testimony of a mistake.	
Effect of setting aside a report.	
Promise to correct error.	

## CHAPTER XI.

THE AWARD MUST BE CO-EXTENSIVE WITH THE SUBMISSION . . . . .	339-368
The stipulation called the <i>ita quod</i> clause in the submission.	
The <i>ita quod</i> clause, if used, still retains its own force.	
The modern rule supersedes, in a measure, the <i>ita quod</i> clause.	
The intention of the parties is the test.	
Withdrawal of some matters from the arbitration.	
The nature of the matters submitted may make the determination of all indispensable.	
Effect of a failure to determine all the matters submitted.	
Exception expressed in the award.	
The motive of the arbitrators is immaterial.	
An award not co-extensive with the submission is not final.	
Awards that nothing is due at the date of submission.	
Award of a sum of money under a general submission.	
Separate matters need not be specifically mentioned.	
Awarding separately on distinct matters.	
Awards of a gross sum under a submission of several matters.	
Award of a particular thing under a general submission.	
Awarding on different pleas in an action.	
An award may be co-extensive with the submission by implication.	
Awards seeking to do general equity are often not final.	
The award must decide respecting all the parties.	
The arbitrator need not award on incidental matters.	
Award of a balance upon money claims.	
The award need determine only such matters as are brought to the arbitrator's notice.	
Notice by the recitals of the submission.	
The recitals of the award may prove notice.	
Silence of the award on an undecided matter.	
A party not injured by the effect cannot avoid the award.	
Method of availing of the objection that the award is not co-extensive with the submission.	
Rules of evidence.	
Presumption that the award disposes of all matters presented.	
This presumption is not conclusive.	
Burden of proof.	

Adjudications exemplifying the rule of favorable presumption.  
 Favorable presumption in cases of doubt.  
 A case where the favorable presumption was not admitted.  
 Award in fact but not apparently co-extensive with the submission.  
 Presumption that the award does not include matters not submitted.  
 Presumption based on award of mutual releases.  
 Award in the alternative.

---

## CHAPTER XII.

### THE AWARD MUST BE ENTIRE AND POSSIBLE . . . 369-376

Meaning of the phrase "entire."  
 There can be but one award.  
 Two certificates in cross-actions.  
 Separate awards embodied in one instrument.  
 The award need not be all contained in a single instrument.  
 The award may refer to extrinsic documents.  
 An award on which judgment is to be rendered must be complete in itself.  
 Marginal notes on an award.  
 Special power to make separate awards.  
 An award must be possible.

---

## CHAPTER XIII.

### THE AWARD MUST BE MUTUAL . . . . . 377-383

Force of the requirement of mutuality.  
 Award ordering releases in mutual.  
 Award of payment to one only of two joint creditors.  
 Force of the word "for" in an award of payment.  
 Award under a submission by an agent.  
 If a party is not bound by the award, it is not mutual.  
 Force of a stipulation concerning releases, contained in the submission.  
 An award neglecting to order a conveyance of real estate.  
 Awards may be mutual by implication.  
 Order that a party pay a debt to a stranger.

---

## CHAPTER XIV.

### THE AWARD MUST BE FINAL . . . . . 384-406

Nature of the requisition of finality.  
 Award should put an end to litigation.  
 Only litigation between the parties need be prevented.

- Award operating for only a limited time.
- Award leaving an act of a judicial nature to be done in the future.
  1. Reservation of further judicial duty or authority to the arbitrator.
  2. Reservation of further judicial duty or authority to a stranger.
  3. Reserving a judicial power to a party.
- The functions of a valuer are judicial.
- The void order may be eliminated, and the rest of the award stand.
- Award reserving a ministerial duty or authority.
- Directions for deductions and calculations.
- Directions for taxation of costs.
- Directions for the calculation of interest.
- Directions for correction of errors.
- Directions for the execution of deeds, releases, &c.
- The ruling in a peculiar case.
- Award upon condition that an act be done by a party.
- Award conditioned to be void upon the happening of an event.
- Entry of judgment on a conditional award.
- Referring questions of law to the court by means of a condition.
- Award conditioned on the arbitrator's authority.
- Award in the alternative.
- Impossibility in one of the alternatives.
- Uncertainty in one of the alternatives.
- Method of availing of want of finality.

---

## CHAPTER XV.

### THE AWARD MUST BE CERTAIN. . . . . 407-435

- Signification of the phrase "certainty."
- A certain award will be enforceable.
- A less degree of certainty is sometimes required.
- Effect of the existence of uncertainty.
- Cases illustrative of fatal uncertainty.
- Certainty created by presumption.
- The favorable presumption is strengthened if the award be *de et super præmissis*.
- Evidence concerning the existence of a dispute.
- Certainty by implication from an award of costs.
- A case where implication was not allowed.
- An order for the payment of costs is certain.
- The award must order the payment of "costs" in terms, or by a clearly equivalent phrase.
- Failure to name party to whom costs are to be paid.
- Award referring to something extrinsic.
- Certainty in awards ordering payments.
- Awards leaving a calculation to be made.
- Awards ordering a computation of interest.
- Orders for payment at the "market price."
- Certainty in the description of a debt.
- Certainty in a general award.
- Certainty as to the time of performing an act ordered.
- Certainty as to place of payment.

Certainty as to persons.  
 Certainty in the description of real estate.  
 An award concerning the price of land.  
 Certainty in awards concerning boundary lines.  
 Certainty in an award in an action of trespass to real estate.  
 Orders concerning mortgages.  
 Awards ordering security.  
 Award concerning a cause.  
 Statute of Limitations.  
 Statement of results.  
 Duty of party to correct uncertainty.  
 Award ordering payments from assets.  
 How uncertainty may be availed of.  
 Explanation of uncertainty.

---

## CHAPTER XVI.

### RULES OF CONSTRUCTION . . . . . 436-451

Ancient prejudice against arbitration.  
 Modern rule is to construe awards liberally.  
 The award is to be construed by the aid of the submission, &c.  
 Construing orders in excess of authority as merely cautionary.  
 An award may be good by manifest implication.  
 An award of costs may be good by implication.  
 An award in too general language may be restricted.  
 The degree of proof required to prevent such restriction.  
 Construction of awards concerning boundary lines.  
 Presumption in awards concerning boundary lines.  
 Explanation of awards concerning boundary lines.  
 Discrepancy between the submission and award concerning a boundary line.  
 Requisition that acts be done interchangeably or contemporaneously.  
 Every presumption and intendment will be in favor of the validity of the award.  
 The presumption is that the arbitrators have followed the submission.  
 Limit to the rule of favorable presumption.  
 Construction of a reservation of a question for the court.  
 Effect of inconsistency in an award.  
 Favorable construction of apparently inconsistent findings.  
 Explanations by the arbitrator.

---

## CHAPTER XVII.

### DIVISIBILITY OF THE AWARD; AWARD GOOD IN PART, BAD IN PART . . . . . 452-485

An award good in part and bad in part may often be separated.  
 Whether the good part need decide all the matters submitted.

An award may be separable in respect of matters all ordered to be done by the same party.

An old English rule.

Cases illustrative of the old rule.

The modern rule.

Cases illustrative of the modern rule.

Elimination of orders in excess of the arbitrator's authority.

Separation where the excess constitutes a portion of a consideration or condition precedent.

Excess in awarding costs is generally separable.

Excess in an order concerning a specific sum.

Excess by establishing a condition precedent may be separable.

Excess in award directing a payment."

Excess in orders for the execution of releases.

Excess in directions for the future conduct of the parties.

Excess in awards concerning real estate and boundaries.

Excess by orders made in respect of strangers to the submission.

Excess by ordering a verdict or a judgment.

If the court cannot distinguish the excess, the whole award is bad.

Excess by not following the submission.

Excess by reserving further powers or duties.

Separation will not be allowed if the decision of the principal point in dispute is to be rejected.

Award of a gross amount, covering matters not within the arbitrator's authority.

Separation of an award finding a gross sum may sometimes be made.

The presumptions will be favorable to separation.

The desire of the courts is to make the separation.

Separation in cases of an uncertainty in part of the award.

Separation may sometimes be effected where the party losing thereby will waive his advantage or objection based on the bad part.

An award in the alternative may be separated.

Effect of an offer to perform an inoperative order.

Effect of separation on directions concerning fees.

The court may hold a separable award under advisement.

Suits instituted upon separable awards.

---

## CHAPTER XVIII.

### EFFECT AND OPERATION OF THE AWARD . . . . . 486-532

An award is final and conclusive.

An award in evidence is conclusive.

Impeaching by evidence an award put in evidence.

An award is equivalent to a decree in equity.

An award on illegal matters is void.

Effect of a colorable award.

Legal character of an award under seal.

An award constitutes a merger and bar of the original claim.

A case where the merger is not effected.

A void award effects no bar or merger.

Extent of the operation of the award in respect of the matters submitted.

- English cases sustaining the rule of conclusiveness as to all matters submitted.  
 An award ordering general releases is final as to all matters submitted.  
 The English rule in equity is doubtful.  
 The English rule in equity concerning unintentionally omitted matters.  
 The English rule seems intrinsically just.  
 The rule of conclusiveness as to matters omitted, in New York.  
 The rule in New York where the scope of the submission is doubtful.  
 The rule in Connecticut.  
 The rule in Vermont.  
 The rule in Maine.  
 The rule in New Hampshire.  
 The rule in Massachusetts.  
 Effect on the rule of a deliberate refusal to present a claim.  
 An award not deciding the controversy is no bar.  
 Award under a submission of matters "in difference."  
 The award bars only the precise matter submitted.  
 Pleading an award in bar to a matter not disposed of by it.  
 The burden of proof where an award is pleaded in bar.  
 Whether a party not having performed his part of an award can plead it in bar.  
 A condition precedent must be performed before an award is a bar.  
 An award is pleadable in bar to a bill in equity.  
 Pleading an award in set-off.  
 Operation of an award to vest the title to personalty.  
 An award as to chattels of the wife is a reduction into possession.  
 Operation of an award upon the title to real estate.  
 An award of commissioners under a statute may pass title.  
 An award finding title to realty will sustain an action in ejectment.  
 Operation of awards determining boundary lines.  
 An award finding title or settling a boundary line is a defence in trespass.  
 An award finding title, not under seal, will operate by way of estoppel.  
 Operation of an oral award concerning a boundary line.  
 An oral award under an oral submission concerning a boundary line is competent evidence.  
 Estoppel by an award need not always be pleaded.  
 Operation of an award simply finding title.  
 Operation of an apparently inadequate award.  
 An award is inoperative as to strangers.  
 An award is inadmissible in evidence against a stranger.  
 An award may sometimes be competent evidence for a stranger.  
 A stranger may by his own act bring himself within the operation of an award.  
 A stranger cognizant of the submission may be within the operation of the award.  
 Parties are bound though the award concerns the rights of a stranger.  
 Operation as to sureties of an award extending time for a principal debtor.  
 The rights of a party under an award may pass to a stranger by assignment.  
 An award is not evidence in a criminal prosecution.  
 Operation of an award in a *lis pendens*.  
 Operation of an award in a *lis pendens*, including extrinsic matters.  
 Effect of the bankruptcy of a party on the operation of an award.  
 An award creates a debt provable in bankruptcy.  
 Recitals in an award as evidence.  
 A valid award needs no ratification.  
 But voidable awards may be rendered operative by ratification.  
 A void award cannot be ratified.  
 Ratification by an agent.  
 An award repudiated by both parties cannot be revived.

## CHAPTER XIX.

## MISCONDUCT AND FRAUD . . . . . 533-544

Acts of an arbitrator indicative of partiality constitute misconduct.  
 Receiving *ex parte* communications constitutes misconduct.  
 Hearing a statement before agreeing to act as arbitrator is proper.  
 Relying wholly on statement of a party is misconduct.  
 Misconduct in refusing to receive evidence.  
 Misconduct in the manner of taking evidence.  
 Misconduct in refusing to allow time.  
 Sundry other acts constituting misconduct.  
 Misconduct of one of several joint arbitrators.  
 Irregularity in conducting the proceedings may constitute misconduct.  
 Awards made on Sunday.  
 A mistake may be treated as misconduct.  
 Fraud and corruption may be inferred from excess or injustice in the award.  
 What constitutes fraud of a party in procuring an award.  
 Concealment of a material fact by a party.  
 The question of fraud or misconduct is one of fact for the jury.  
 Manner of setting up fraud or misconduct.  
 Force of the phrase "undue means."  
 Method of availing of fraud, corruption, or misconduct.  
 An award cannot be impeached by evidence of misconduct.  
 Answering allegations of fraud or misconduct.

---

## CHAPTER XX.

## PERFORMANCE OF THE AWARD . . . . . 545-561

Time of performance.  
 A colorable performance is bad.  
 Performance according to the intent of the award is sufficient.  
 Performance to a reasonable intent.  
 Performance of awards ordering payment.  
 Non-performance of awards ordering payment of rent.  
 Performance of awards putting an end to suits.  
 Performance under an award calling for a deed.  
 By which party an instrument of conveyance is to be prepared.  
 Whether a request for a conveyance ordered is necessary.  
 A request for performance must comply with the terms of the award.  
 The request may be made by an agent.  
 Release may be executed to a stranger.  
 A tender creates the obligation of performance.  
 Performance to and by representatives of a deceased party.  
 Performance where the award is in excess of authority.  
 Performance of awards ordering indemnity.  
 Performance of awards ordering acquittance or that suits should cease.  
 A party may sometimes sue before he has performed his part under the award.  
 The plaintiff must perform, if performance be made dependent, concurrent, or a condition precedent.  
 Performance of impossible orders.  
 Where the impossibility grows out of a wrongful act of the party.



Performance of an award in the alternative.  
 An informal award may be made good by performance.  
 The effect of performing an unenforceable order.  
 The arbitrators need not perform the award.  
 The award itself after performance.  
 Security for performance of the award.

## CHAPTER XXI.

### TESTIMONY OF THE ARBITRATOR . . . . . 562-572

The award cannot be altered or explained by testimony or statements of the arbitrator.

Effect of letters written by the arbitrator.  
 Explanatory paper written by agreement of parties.  
 The arbitrator's testimony concerning extrinsic facts.  
 Testimony of referee as to facts and grounds of decision.  
 The arbitrator's testimony as to admissions by a party.  
 An arbitrator cannot testify to his non-concurrence in the award.  
 The arbitrator cannot be compelled to state the grounds of his decision.  
 In England a barrister never gives explanations.  
 Testimony of the arbitrator to show a mistake in the award.  
 Testimony that the award does not express the arbitrator's intention.  
 An arbitrator can and must testify as to the proceedings before him.

## CHAPTER XXII.

### PLEADING AND PRACTICE . . . . . 573-621

Methods of enforcing an award.  
 An award may be enforced in part only.  
 Time of instituting suit.  
 Actions to recover costs.  
 Recovery of costs by *assumpsit*.  
*Assumpsit* will lie upon an award.  
*Assumpsit* by assignees of an original party.  
 Debt will lie upon an award of money.  
 Action of debt on the arbitration bond.  
 Action on the bond after an enlargement of time.  
 An action of covenant on a submission by deed.  
 Action on the case under an award.  
 Interest on a sum awarded.  
 Averments in pleading an award.  
 Setting forth the award in the plaintiff's declaration.  
 Pleading on a parol award.  
 No *profert* of the award need be made.  
 Averment of notice.  
 Averment of a demand before suit brought.  
 Averment of a request of performance.  
 The pleadings in an action of debt on an arbitration bond.

Availing of an award by way of defence: extinction of the original claim: plea in bar.

Plea of "no award."

Pleading that all matters are not decided.

Pleading misconduct, fraud, or mistake of the arbitrator.

Pleading illegality in the matter submitted.

Pleading performance of the award.

Pleading the Statute of Limitations.

Pleading revocation of the submission.

Pleading foreign attachment.

Pleading an oral waiver.

Plea that award was not ready in time.

Plea that the cause of action was not submitted.

Defence in suit on a promissory note.

Demurrer in suit on an award.

Execution of the submission must be proved.

Proving the existence and contents of a lost submission.

Part performance of award is evidence of submission.

Statements of a party as evidence.

Evidence of fraud.

Enforcing specific performance of an award by proceedings in equity.

Acquiescence as a preliminary to a decree for specific performance.

A penalty does not take the place of performance.

Right to specific performance as affected by lapse of time.

No specific performance of illegal matters.

Enforcement of unreasonable orders.

Enforcement of specific performance by and against strangers.

Demurrer to a bill for specific performance.

Sustaining an award by injunction.

Pleading an award in bar to a bill in equity.

Vacating an award by motion.

Discovery of new matter as a ground of a motion to set aside an award.

The element of time in connection with new evidence.

Effect of vacating a report in a *lis pendens*.

The English rule as to setting aside an award by proceedings in equity.

The American rule as to setting aside an award by proceedings in equity.

Charges in the bill.

Demurrer to the bill.

Making an arbitrator a defendant.

---

## CHAPTER XXIII.

COSTS . . . . . 622-632

### I. — ENGLISH CASES.

Different kinds of costs.

Power of the arbitrator where the submission is silent as to costs.

Power over costs expressly conferred by the submission.

Apportionment of costs by the arbitrator.

The arbitrator's action in respect of his own fees.

Stipulation that costs shall abide the event.

## II. — THE AMERICAN CASES.

- Distinction between different kinds of costs.
- The power of arbitrators over the costs of the arbitration.
- The power of arbitrators over the costs of suit.
- An eccentric decision.
- Omission to find costs in the award.
- Stipulation that costs shall abide the event.
- Form of an award of costs.
- An award merely of costs.

## TABLE OF CASES.

### A.

Abbott <i>v.</i> Dexter, 6 Cush. 108 . . . . .	8, 44, 45
<i>v.</i> Keith, 11 Vt. 525 . . . . .	235
Abrahat <i>v.</i> Brandon, 10 Mod. 201 . . . . .	193, 465
Ackerman <i>v.</i> Congdon (unreported) . . . . .	57
Ackley <i>v.</i> Finch, 7 Cow. 290 . . . . .	153, 161
Adams <i>v.</i> Adams, 8 N. H. 82 . . . . .	64, 66, 67, 178, 476, 612
<i>v.</i> Adams, 2 Mod. 169 . . . . .	193, 244, 278
<i>v.</i> Bankart, 1 Cr. M. & R. 681 . . . . .	19, 572
<i>v.</i> Stratham, 2 Lev. 235 . . . . .	204
Adcock <i>v.</i> Wood, 6 Exch. 814 . . . . .	595
Addison <i>v.</i> Gray, 2 Wils. 293 . . . . .	368, 481, 483
<i>v.</i> Spittle, 6 Dowl. & Low. 531 . . . . .	278, 481, 483
Adm'r of Colkins <i>v.</i> Ptnr. of Thaxton, Cam. & M. Congr. R. 93 . . . . .	67
Agar <i>v.</i> Macklew, 2 Sim. & Stu. 418 . . . . .	90
Ainsley <i>v.</i> Goff, B. R. 1799 . . . . .	220
Aitcheson <i>v.</i> Cargey, 2 Bing. 199 . . . . .	462, 463
Akely <i>v.</i> Akely, 16 Vt. 450 . . . . .	48, 55, 69, 258, 430
Aldrich <i>v.</i> Jessiman, 8 N. H. 516 . . . . .	226, 227, 428, 431, 435, 562
Alexandria Canal Co. <i>v.</i> Swan, 5 How. (U. S.) 83 . . . . .	5, 18, 19, 243
Alford <i>v.</i> Lea, 2 Leon. 110 . . . . .	553
Allegre <i>v.</i> Maryland Ins. Co., 6 Har. & J. 408 . . . . .	91
Allen <i>v.</i> Chase, 3 Wis. 249 . . . . .	48
<i>v.</i> Francis, 9 Jur. 691 . . . . .	134
<i>v.</i> Galpin, 9 Barb. 246 . . . . .	237, 259, 275
<i>v.</i> Harris, 1 Ld. Raym. 122 . . . . .	506, 591
<i>v.</i> Kingsbury, 16 Pick. 235 . . . . .	444
<i>v.</i> Lowe, 4 Q. B. 66 . . . . .	215
<i>v.</i> Miles (Smith's Adm'r), 4 Harringt. 234 . . . . .	141, 303
<i>v.</i> Milner, 2 Cr. & Jer. 47 . . . . .	488
<i>v.</i> Ranney, 1 Conn. 569 . . . . .	326, 616
<i>v.</i> Watson, 16 Johns. 205 . . . . .	230, 231
<i>v.</i> Way, 7 Barb. 585 . . . . .	138, 139, 146
Allenby <i>v.</i> Proudlock, 4 Dowl. 54 . . . . .	54

Alling <i>v.</i> Munson, 2 Conn. 691 . . . . .	19, 628
Alsop <i>v.</i> Senior, 2 Keb. 707 . . . . .	14, 203
Ames <i>v.</i> Milward, 8 Taunt. 637 . . . . .	310, 450
Anderson <i>v.</i> Darcy, 18 Ves. Jr. 447 . . . . .	136, 323
<i>v.</i> Farnham, 34 Maine, 161 . . . . .	72
<i>v.</i> Wallace, 3 Cl. & Fin. 26 . . . . .	126, 127, 168, 393
Andrews <i>v.</i> Foster, 42 N. H. 376 . . . . .	628
<i>v.</i> Lee, 3 Penn. 99 . . . . .	87
<i>v.</i> Palmer, 4 Barn. & Ald. 250 . . . . .	30, 235, 527, 528
Angus <i>v.</i> Retford, 11 M. & W. 69, 2 Dowl. n. s. 735 . . . . .	198, 215, 624
<i>v.</i> Smythies, 2 Fost. & Fin. 381 . . . . .	122
Anning <i>v.</i> Hartley, 27 L. J. Exch. 145 . . . . .	127, 153
Antram <i>v.</i> Chace, 15 East, 208 . . . . .	33, 529, 600
Applegate <i>v.</i> Schureman, 2 Penn. 868 . . . . .	71
Apsley <i>v.</i> Crosley, Barnes, 54 . . . . .	526
Archer <i>v.</i> Owen, 9 Dowl. 341 . . . . .	312
<i>v.</i> Williamson, 2 Har. & Gill. 62 . . . . .	344, 437
Armitage <i>v.</i> Coates, 4 Exch. 641 . . . . .	594
<i>v.</i> Walker, 2 Kay & J. 211 . . . . .	184, 186
Armitt <i>v.</i> Breame, 2 Ld. Raym. 1076 . . . . .	425, 426
Armstrong <i>v.</i> Marshall, 4 Dowl. 593 . . . . .	136, 215
<i>v.</i> Masten, 11 Johns. 189 . . . . .	490, 506
<i>v.</i> Percy, 5 Wend. 535 . . . . .	68
Ashton <i>v.</i> Pointer, 3 Dowl. 201 . . . . .	315, 324, 539
Askew <i>v.</i> Kennedy, 1 Bailey, 46 . . . . .	141, 321
Aspinwall <i>v.</i> Tousey, 2 Tyler (Vt.), 328 . . . . .	230, 239
Athelstone <i>v.</i> Moon, Comyn, 547 . . . . .	31
Atkins <i>v.</i> Baldwin, 1 Stark. 209 . . . . .	197
Atkinson <i>v.</i> Abraham, 1 Bos. & P. 175 . . . . .	126
Attorney-General <i>v.</i> Clements, 1 Turn. & R. 58 . . . . .	5
<i>v.</i> Davison, 1 McLel. & Yerg. 160 . . . . .	135, 141
<i>v.</i> Jackson, 5 Hare, 355 . . . . .	619
Aubert <i>v.</i> Maze, 2 Bos. & P. 375 . . . . .	216, 461
Auriol <i>v.</i> Smith, 1 Turn. & R. 121 . . . . .	454, 605
Austin <i>v.</i> Snow's Lessee, 2 Dall. 157 . . . . .	54, 628
Ayland <i>v.</i> Nicholls, Freem. 265 . . . . .	378

## B.

Babb <i>v.</i> Stromberg, 14 Penn. St. 397 . . . . .	17
Backhouse <i>v.</i> Taylor, 20 L. J. Q. B. 233 . . . . .	15
Bacon <i>v.</i> Crandon, 15 Pick. 79 . . . . .	234, 628
<i>v.</i> Dubarry, 1 Ld. Raym. 246 . . . . .	14, 204, 381
<i>v.</i> Ward, 10 Mass. 141 . . . . .	86
<i>v.</i> Wilbur, 1 Cow. 117 . . . . .	445, 455, 467
Badger, <i>in re</i> , 2 Barn. & Ald. 691 . . . . .	186, 216, 222

<i>Baggalay v. Mackwick</i> , 30 L. J. C. P. 342 . . . . .	295, 316
<i>Bailey v. Lechmere</i> , 1 Esp. Ca. 377 . . . . .	256, 487, 488
<i>Baillie v. Edinburgh Oil Gas Co.</i> , 3 Cl. & Fin. 639 . . . . .	180, 400
<i>Baily v. Curling</i> , 20 L. J. Q. B. 235 . . . . .	418, 426
<i>Baker's Heirs v. Crockett, Hardin (Ky.)</i> , 388 . . . . .	234, 294, 540
<i>Baker v. Hunter</i> , 16 L. J. Exch. 203 . . . . .	276, 277, 278
<i>v. Lafitte</i> , 4 Rich. Eq. 392 . . . . .	148
<i>v. Lovett</i> , 6 Mass. 78 . . . . .	4
<i>Ballard v. Mitchell</i> , 8 Jones' Law, 153 . . . . .	432
<i>Baltimore and Ohio R.R. Co. v. Polly</i> , 14 Gratt. 447 . . . . .	38
<i>Banfill v. Leigh</i> , 8 Term, 571 . . . . .	580
<i>Bank of Monro v. Widner</i> , 11 Paige, 529 . . . . .	230, 232
<i>Banks v. Adams</i> , 23 Maine, 259 . . . . .	464
<i>v. Banks</i> , 1 Gale, 46 . . . . .	132, 536
<i>Bannel v. Pinto</i> , 2 Conn. 431 . . . . .	487
<i>Baracliff's Executors v. Griscom's Adm'rs, Coxe (N. J.)</i> , 165 . . . . .	21
<i>Bargrave v. Atkins</i> , 3 Lev. 413 . . . . .	417, 456, 481, 483
<i>Barker v. Belknap's Est.</i> , 39 Vt. 168 . . . . .	66
<i>v. Lees</i> , 2 Keb. 64 . . . . .	233
<i>v. Tibson</i> , 2 W. Bl. 953 . . . . .	463
<i>Barlow v. Todd</i> , 3 Johns. 367 . . . . .	332, 593
<i>Barnardiston v. Fowler</i> , 10 Mod. 204 . . . . .	549
<i>Barnard v. Spofford</i> , 31 Maine, 39 . . . . .	140
<i>Barnes v. Greenwell, Cro. Eliz.</i> 858 . . . . .	365
<i>Barnet v. Gilson</i> , 3 Serg. & R. 340 . . . . .	432
<i>Barnett v. Peck</i> , 6 Vt. 456 . . . . .	44, 45, 47
<i>Barney v. Fairchild, Rolle's Abr. Arb., E. 10, p. 248</i> . . . . .	204, 454, 457, 467
<i>Barret v. Fletcher, Yelv.</i> 152 . . . . .	589, 590
<i>v. Parry</i> , 4 Taunt. 657 . . . . .	626
<i>Barrett v. Wilson</i> , 1 Cr. Mee. & Ros. 586 . . . . .	312
<i>Barrows v. Capen</i> , 11 Cush. 37 . . . . .	188, 460
<i>Barry v. Rush</i> , 1 Term, 691 . . . . .	20, 21, 192
<i>Barton v. Ransom</i> , 3 Mee. & W. 322 . . . . .	312, 392, 403
<i>Baspole's Case</i> , 8 Coke, 193 . . . . .	31
<i>Baspoole v. Freeman, Cro. Jac.</i> 285 . . . . .	380
<i>Bassett v. Harkness</i> , 9 N. H. 164 . . . . .	332
<i>Bassett's Adm'r v. Cunningham's Adm'r</i> , 9 Gratt. 684 . . . . .	241, 243
<i>Bateman v. Olivia, Countess of Ross</i> , 1 Dow. 235 . . . . .	29
<i>Bates v. Cook</i> , 7 Barn. & Cr. 407 . . . . .	243
<i>v. Curtis</i> , 21 Pick. 247 . . . . .	579
<i>v. Townley</i> , 2 Exch. 152, 1 Exch. 572 . . . . .	488, 577, 579, 585
<i>v. Visser</i> , 2 Cal. 355 . . . . .	15
<i>Bathey v. Butler</i> , 13 Johns. 187 . . . . .	163, 274
<i>v. Button</i> , 13 Johns. 157 . . . . .	272
<i>Baxter v. Thompson</i> , 25 Vt. 505 . . . . .	85
<i>Bayley v. Adams</i> , 6 Ves. Jr. 589 . . . . .	610
<i>Bayne v. Morris</i> , 1 Wall. 97 . . . . .	226, 581

Beahorn v. Wolfe, 1 Alcock & Nap. 233 . . . . .	186
Beale v. Beale, Cro. Car. 383 . . . . .	417, 420
Bean v. Farnam, 6 Pick. 269 . . . . .	4, 19, 20, 23, 25, 332, 586, 594, 595, 600
v. Newbury, 1 Lev. 139 . . . . .	32, 340
v. Wendell, 22 N. H. 582 . . . . .	164, 294, 297
Beardsley v. Dygert, 3 Denio, 380 . . . . .	68
Beck v. Jackson, 1 C. B. N. s. 695 . . . . .	152
Beckett v. Taylor, 1 Mod. 9 . . . . .	204
Beckingham v. Hunter, Rolle's Abr. Arb., D., 8 . . . . .	197
Beckwith v. Warley, Rolle's Abr. Arb. H., 9 . . . . .	473
Bedam v. Clerkson, 1 Ld. Raym. 123 . . . . .	203, 410
Bedell v. Moore, 10 Rep. 131 . . . . .	456
Bedington v. Southall, 4 Price, 232 . . . . .	145
Beebee v. Trafford, Kirby (Conn.), 215 . . . . .	25
Bell v. Benson, 2 Chitty, 157 . . . . .	623
Belchier v. Reynolds, 2 Ld. Kenyon, Part II. 87 . . . . .	606
Bell v. Price, 2 Zab. 578 . . . . .	298, 326, 330, 373
v. Twentymen, 1 Q. B. 766 . . . . .	546
Bemus v. Clarke, 29 Penn. St. 251 . . . . .	85, 172
v. Quiggle, 7 Watts, 363 . . . . .	47, 72, 80
Benjamin v. Benjamin, 5 Watts & S. 562 . . . . .	48, 80
Bennett v. Pierce, 28 Conn. 315 . . . . .	24
Bergh v. Pfeiffer, Hill & Den. 110 . . . . .	133
Berkshire Woolen Co. v. Day, 12 Cush. 128 . . . . .	61, 72, 201, 212, 561
Berney v. Read, 7 Q. B. 79 . . . . .	600
Berry v. Penning, Cro. Jac. 399 . . . . .	347
v. Perry, 3 Bulst. 62 . . . . .	159
v. Wade, Cas. Temp. Finch, 180 . . . . .	608
Beverly v. Stephens, 17 Ala. 701 . . . . .	15
Bhear v. Harradine, 7 Exch. 269 . . . . .	347, 361
Biddell v. Dowse, 6 Barn. & Cr. 255 . . . . .	343, 381, 585
Bigelow v. Goss, 5 Wis. 421 . . . . .	74
v. Newell, 10 Pick. 348 . . . . .	214, 296, 302
v. Maynard, 4 Cush. 317 . . . . .	226, 243, 265, 337, 348, 355, 424, 566, 568
Biggs v. Hansell, 16 C. B. 562 . . . . .	132, 133
Bignall v. Gale, 2 Man. & Gr. 830 . . . . .	126, 172
Billington v. Sprague, 22 Maine, 34 . . . . .	63, 164, 538, 630
Bingham's Trustees v. Guthrie, 19 Penn. St. 418 . . . . .	15, 16, 19, 72, 87
Binnse v. Wood, 47 Barb. 624 . . . . .	110, 119
Bird v. Bird, 1 Salk. 74 . . . . .	203
v. Cooper, 4 Dowl. 148 . . . . .	343, 487
v. Penrice, 6 Mee. & W. 754 . . . . .	334, 335
v. Sands, 1 Johns. Ca. 394 . . . . .	149
Birks v. Trippett, 1 Saund. 32 . . . . .	342, 368
Bishop of Bath & Wells v. Hipposly, 3 Atk. 607 . . . . .	5, 607
Bishop v. Bishop, 1 Rep. in Chy. 75, 141 . . . . .	605, 607, 608



Bishop v. Webster, 1 Ca. in Eq. Ab. 51, pl. 9 . . . . .	605
Bissex v. Bissex, 3 Bur. 1730 . . . . .	585
Bixby v. Whitney, 5 Greenl. 192 . . . . .	65, 499, 502
v. Whitney, 11 Maine (2 Fairf.), 62 . . . . .	148
Black v. Pearson, 1 McCord, 137 . . . . .	162
Blair v. Wallace, 21 Cal. 317 . . . . .	55
Blaisdell v. Blaisdell, 14 N. H. 78 . . . . .	239
Blanchard v. Lilly, 9 East, 497 . . . . .	269
v. Murray, 15 Vt. 548 . . . . .	82, 85, 578, 588
Blanton v. Gale, 6 B. Monr. 260 . . . . .	128, 178
Blennerhassett v. Day, 2 Ball & Beatty, 104 . . . . .	216, 536
Blin v. Trimble, 2 Tyler, 304 . . . . .	153, 161
Bliss v. Rollins, 6 Vt. 529 . . . . .	214
Block v. Palgrave, Cro. Eliz. 797 . . . . .	281
Blood v. Robinson, 1 Cush. 389 . . . . .	333, 335
Bloomer v. Sherman, 5 Paige, 575 . . . . .	83, 85, 262, 280
Bloore v. Potter, 9 Wend. 480 . . . . .	69
Blossom v. Van Amringe, 63 N. C. 65 . . . . .	266
Blundell v. Brettargh, 17 Ves. Jr. 232, 240 . . . . .	257, 490, 572
Blunt v. Whitney, 3 Sandf. 4 . . . . .	68
Boardman v. England, 6 Mass. 70 . . . . .	159
Bodington v. Harris, 1 Bing. 187 . . . . .	17
Bonner v. Liddell, 1 Ball & B. 80 . . . . .	470, 471
v. McPhail, 31 Barb. 106 . . . . .	132
Boodle v. Davis, 3 Ad. & E. 200 . . . . .	54, 199, 211, 463, 612
Booth v. Garnett, 2 Strange, 1082 . . . . .	185
Borrowdale v. Hitchener, 3 Bos. & Pul. 244 . . . . .	215
Boston v. Brazer, 11 Mass. 447 . . . . .	6, 67
Boston Water Power Co. v. Gray, 6 Metc. (Mass.) . . . . .	131, 177, 197, 200,
212, 214, 217, 220, 293, 302, 305, 315, 316, 317, 320, 336, 568	
Boston & Worcester R.R. Co. v. Western R.R. Co., 14 Gray, 253 . . . . .	110,
202, 212	
Bouck v. Wilber, 4 Johns. 405 . . . . .	603
Boutillier v. Thick, 1 Dowl. & Ry. 366 . . . . .	215, 299, 316
Bowes v. Fernie, 4 M. & Cr. 150 . . . . .	342, 345, 346, 368, 454
v. French, 2 Fairf. 382 . . . . .	46
Bowman v. Downer, 28 Vt. 532 . . . . .	362, 628
Bowen v. Laning, 1 Penning. 139 . . . . .	111, 112
Bowyer v. Blorksidge, 3 Lev. 17 . . . . .	25
v. Garland, Cro. Eliz. 600 . . . . .	582
Boyd's Heirs v. Magruder's Heirs, 2 Robins. 761 . . . . .	31
Boyes v. Bluck, 13 C. B. 652 . . . . .	192, 193, 446, 625
Boyer v. Amand, 2 Watts, 74 . . . . .	241
v. Stewart, 2 Hayw. 111 . . . . .	83
Boynton v. Butterfield, 6 Allen, 67 . . . . .	598
v. Frye, 33 Maine, 216 . . . . .	200, 475
Bracher v. Cotton, Barnes, 123 . . . . .	623

Bradbee v. Christ's Hospital, 4 Man. & Gr. 714 . . . . .	312
Braddick v. Thompson, 8 East, 344 . . . . .	143, 542, 598
Bradford v. Beavan, Willes, 270 . . . . .	342
v. Bryan, Willes, 268 . . . . .	342, 345
Bradsey v. Clyston, Cro. Car. 541 . . . . .	204, 279, 585
Bradshaw v. East & West India Docks, &c., <i>in re</i> , 12 Q. B. 562 . . . . .	210, 326
Bradstreet v. Erskine, 50 Maine, 407 . . . . .	110
Brady v. Mayor of Brooklyn, 1 Barb. 584 . . . . .	4, 5, 7, 52
Brainard v. Dunning, 30 N. Y. 211 . . . . .	434
Brann v. Inhab's of Vassalboro', 50 Maine, 64 . . . . .	334, 616
Branscome v. Rowcliff, 6 C. B. 523 . . . . .	42
Braunstein v. Accidental Death Ins. Co., 31 L. J. Q. B. 17 . . . . .	93
Bray v. English, 1 Conn. 498 . . . . .	117, 123, 147, 232, 237
Brazier v. Bryant, 10 Moore, 587, Dowl. 600 . . . . .	542, 543, 626
v. Jones, 8 Barn. & Cr. 124 . . . . .	600
Brett v. Beales, 1 Moo. & M. 416 . . . . .	519
Bretton v. Prat, Cro. Eliz. 758 . . . . .	203, 467
Brickhead v. Archbishop of York, Hob. 197 . . . . .	590
Brickhouse v. Hunter, 4 Hen. & Munf. 363 . . . . .	322, 336, 374, 402
Bridgeham v. Prince, 33 Maine, 174 . . . . .	25
Bridges v. Vick, 2 Humph. 516 . . . . .	74
Briggs v. Bennett, 26 Vt. 146 . . . . .	70
v. Brewster, 23 Vt. 100 . . . . .	498
v. Oaks, 28 Vt. 138 . . . . .	70, 207
Brisbane v. Mitchell, 8 Serg. & R. 423 . . . . .	59
Britton v. Williams, 6 Munf. 453 . . . . .	4
Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436 . . . . .	609
Broadhurst v. Darlington, 2 Dowl. 38 . . . . .	305, 314
Brooke v. Bannon, 3 Watts & S. 382 . . . . .	172
v. Mitchell, 6 Mee. & W. 473 . . . . .	226, 288, 588
Brookins v. Shumway, 18 Wis. 98 . . . . .	84, 85
Brooks v. Christopher, 5 Duer, 216 . . . . .	146, 147
Brophy v. Holmes, 2 Moll. 1 . . . . .	138, 143, 346, 404, 569, 614
Brower v. Kingsley, 1 Johns. Ca. 334 . . . . .	153, 161, 224, 226
Browes v. Bruce, Watson on Aw. 4, n. 3 . . . . .	53
Browning v. M'Manus, 1 Whart. 177 . . . . .	84, 85, 172
v. Wheeler, 24 Wend. 258 . . . . .	106, 111, 112, 113
Brown v. Bellows, 4 Pick. 179 . . . . .	165, 166, 175
v. Brown, 1 Vern. 157 . . . . .	316
v. Clay, 31 Maine, 518 . . . . .	214, 294, 300, 313
v. Copp, 5 N. H. 223 . . . . .	83, 261
v. Croyden Canal Co., <i>in re</i> , 9 Ad. & E. 522 . . . . .	315, 349
v. Dalton, Rolle's Abr. Arb. H. 10, p. 250 . . . . .	473
v. Goodman, 3 Term, 592 . . . . .	583
v. Green, 7 Conn. 536 . . . . .	326
v. Hankerson, 3 Cow. 70 . . . . .	328, 428, 431
v. Hellerby, 1 Hurl. & Nor. 729 . . . . .	617

Brown v. Hellerby, 26 L. J. N. S. Exch. 217 . . . . .	327, 617
v. Kincaid, Wright, 37 . . . . .	43
v. Leavitt, 26 Maine, 251 . . . . .	66, 101, 105, 118, 123, 147, 171, 172, 230, 231, 233, 237, 238, 239
v. Mathes, 5 N. H. 229 . . . . .	628, 630
v. Meverell, Dyer, 216, b. . . . .	204, 346
v. Schaeffer, 6 Binn. 177 . . . . .	77
v. Scott, 1 Dall. 145 . . . . .	73
v. Tanner, 1 Carr. & Pay. 651 . . . . .	583
v. Vawser, 4 East, 584 . . . . .	279, 490
v. Watson, 6 Bing. N. C. 118 . . . . .	185
v. Welcher, 1 Coldw. 197 . . . . .	79
v. Wheeler, 17 Conn. 345 . . . . .	36
Browne v. Marsden, 1 H. Bl. 223 . . . . .	625
Buchanan v. Curry, 19 Johns. 137 . . . . .	7, 8, 9, 12, 381
Buchoz v. Grandjean, 1 Mich. 367 . . . . .	8
Buck v. Buck, 2 Vt. 417 . . . . .	498
v. Wadsworth, 1 Hill, 321 . . . . .	262, 280, 281, 282
Buckland, Inhab. of v. Inhab. of Conway, 16 Mass. 396 . . . . .	10, 11, 13, 15, 254, 255, 352, 414, 441
Buckle v. Roach, 1 Chit. 193 . . . . .	17
Buckman v. Davis, 28 Penn. St. 211 . . . . .	44
Buel v. Dewey, 22 How. Pr. 342 . . . . .	74, 76, 80
Bullard v. Coolidge, 3 Mass. 324 . . . . .	45
Bullitt v. Musgrove, 3 Gill. 31 . . . . .	15, 118, 124, 532
Bullock v. Hoon, 4 Wend. 531 . . . . .	83
Bulsom v. Lampman, 1 Kansas, 324 . . . . .	46, 50
Bulson v. Lobnes, 29 N. Y. 291 . . . . .	44, 156
Bumpass v. Webb, 4 Porter, 65 . . . . .	294, 321, 540
Bunnell v. Pinto, 4 Conn. 431 . . . . .	497
Burchell v. Marsh, 17 How. 344 . . . . .	294, 295
Burdett v. Harris, 3 Keb. 387 . . . . .	244
Burghardt v. Turner, 12 Pick. 534 . . . . .	601
Burnell v. Minot, 4 Moore, 340 . . . . .	8
Burnside v. Whitney, 21 N. Y. 148 . . . . .	43, 44, 576
v. Whitney, 26 Barb. 632 . . . . .	575
v. Whitney, 24 Barb. 632 . . . . .	575
Burroughs v. Thorne, 2 South, 777 . . . . .	143
Burton v. Ellington, 3 Bro. C. C. 196 . . . . .	611
v. Knight, 2 Vernon, 515 . . . . .	108
v. Wigley, 1 Bing. N. C. 665 . . . . .	187
Bury v. Dunn, 1 Dowl. & Low, 141 . . . . .	215
Busfield v. Busfield, Cro. Jac. 577 . . . . .	203, 365, 585
Bushey v. Culler, 26 Md. 534 . . . . .	118
Butcher v. Cole, 1 Anst. 99 . . . . .	610
Butler v. Bogles, 10 Humph. 155 . . . . .	226
v. Mayor, &c., of New York, 1 Hill, 489 . . . . .	241, 243

Butler v. Mayor, &c., of New York, 7 Hill, 329 . . . . .	178, 181, 214, 374, 408, 418, 420, 437, 480, 612
<i>v. Mace</i> , 47 Maine, 423 . . . . .	58
<i>v. Masters</i> , 13 Q. B. 341 . . . . .	543
Byam v. Robbins, 6 Allen, 63 . . . . .	51, 518
Byers v. Van Deusen, 5 Wend. 268 . . . . .	55, 65, 367, 431
Byrd v. Odem, 9 Ala. 755 . . . . .	43, 50, 56

## C.

Cable v. Rogers, 3 Bulst. 311 . . . . .	192, 256
Cahill v. Benn, 6 Binney, 99 . . . . .	15
Cailer v. Elgood, 2 Dowl. & Ry. 193 . . . . .	215
Cain v. Pullam, 1 Hay, 173 . . . . .	233
Caledonian R.R. Co. v. Lockhart, 3 Macq. 808 . . . . .	144, 167, 168, 233
Calcraft v. Roebuck, 1 Ves. Jr. 227 . . . . .	106
Caldwell v. Dickinson, 13 Gray, 365 . . . . .	196, 252, 261, 277, 287, 432, 463, 562, 603, 604, 606
Calhoun's Lessee v. Dunning, 4 Dall. 120 . . . . .	511
Calvert v. Carter, 18 Md. 73 . . . . .	66, 228
Camp v. Bank of Owego, 10 Watts, 130 . . . . .	78
<i>v. Root</i> , 18 Johns. 22 . . . . .	74
Campbell v. Twemlow, 1 Price, 81 . . . . .	136
<i>v. Western</i> , 3 Paige, 124 . . . . .	135, 164, 165, 294, 315, 338, 535, 568
Canal Trustees v. Lynch, 5 Gilm. 527 . . . . .	38
Candler v. Fuller, Willes, 62 . . . . .	454, 463, 548, 550, 623
Carr v. Smith, 5 Q. B. 128 . . . . .	37
Carey v. Wilcox, 6 N. H. 177 . . . . .	55, 332
Cargey v. Aitcheson, 2 B. & C. 170 . . . . .	349, 389, 411, 416, 418, 599, 625
Carnochan v. Christie, 1 Wheat, 446 . . . . .	266, 340, 345, 354, 400, 425, 546
Carpenter v. Edwards, 10 Metc. (Mass.) 200 . . . . .	527
<i>v. Wood</i> , 1 Metc. (Mass.) 409 . . . . .	153, 155, 156, 158
Carroll v. Blencow, 4 Esp. 27 . . . . .	28
Carson v. Carson, 1 Metc. (Ky.) 434 . . . . .	80
<i>v. Earlywine</i> , 14 Ind. 256 . . . . .	43, 50, 56
Carter v. Carter, 1 Vern. 259; 1 Eq. Ca. Abr. 49; 2 Rep. 289 . . . . .	31
<i>v. Calvert</i> , 4 Md. Chy. 199 . . . . .	66
<i>v. Sams</i> , 4 Dev. & Bat. 182 . . . . .	538
Case v. Barber, T. Raym. 450 . . . . .	506
<i>v. Ferris</i> , 2 Hill, 75 . . . . .	411, 446
Cassell, <i>in re</i> , 9 Barn. & Cr. 624 . . . . .	243
Cater v. Startut, Rolle's Abr. Arb. H. 7 . . . . .	397
Caton v. McTavish, 10 Gill & J. 192 . . . . .	72, 362, 367, 453
Cator v. Croydon Canal Co., 4 Younge & Coll. 405 . . . . .	512
Cavanagh v. Dooley, 6 Allen, 66 . . . . .	91
Cavendish v. Wood, Eq. Ca. Abr. 49 } . . . . .	5, 381
<i>v. Wood</i> , 1 Ca. in Chy. 279 }	

Cayhill v. Fitzgerald, 1 Wils. 28, 58 . . . . .	15, 204, 381, 388
Chace v. Westmore, 13 East, 356 . . . . .	292, 315, 333
Chadbourn v. Chadbourn, 9 Allen, 173 . . . . .	19, 23
Champion v. Wenham, Amb. 245 . . . . .	618
Chapin v. Boody, 25 N. H. 285 . . . . .	447, 628, 630
Chaplin v. Kirwan, 1 Dall. 187 . . . . .	117, 127, 169
Chapman v. Dalton, 1 Plowd. 289 . . . . .	31
v. Seccomb, 36 Maine, 102 . . . . .	76, 80, 236
Charnley v. Winstanley, 5 East, 266 . . . . .	235, 583, 598
Chase v. Strain, 15 N. H. 535 . . . . .	453, 454, 459, 464, 474, 627, 629
Cheshire Bank v. Robinson, 2 N. H. 126 . . . . .	63, 213
Chesley v. Chesley, 10 N. H. 327 . . . . .	138, 139
Chichester v. McIntire, 1 Dowl. N. S. 460 . . . . .	536
Chicot v. Lequesne, 2 Ves. Sr. 315 . . . . .	542, 620
Child v. Horden, 2 Bulst. 143 . . . . .	546, 588
Ching v. Ching, 6 Ves. Jr. 281 . . . . .	54, 315
Christman v. Moran, 9 Barr, 487 . . . . .	174
Chuck v. Cremer, 2 Phill. 477 . . . . .	619
Churcher v. Stringer, 2 Barn. & Ad. 777 . . . . .	584
Church v. Roper, 1 Rep. in Chy. 75, 141 . . . . .	606
Clapcott v. Davy, 1 Ld. Raym. 611 . . . . .	383
Clark v. Burt, 4 Cush. 396 . . . . .	55, 444, 445, 563
Clarke v. Owen, 2 Hurl. & Nor. 324 . . . . .	626
Cleary v. Coor, 1 Hayw. 225 . . . . .	314
Cleaveland v. Dixon, 4 J. J. Marsh. 226 . . . . .	226, 322
v. Hunter, 1 Wend. 104 . . . . .	145
Cleesly v. Peese, 8 Moore, 524 . . . . .	572
Clegg v. Dearden, 12 Q. B. 576 . . . . .	492
Cleland v. Hedly, 5 R. I. 163 . . . . .	535, 609
Clement v. Comstock, 2 Mich. 359 . . . . .	48
v. Durgin, 1 Greenl. 300 . . . . .	453, 454, 470
v. Hadlock, 13 N. H. 185 . . . . .	231
v. Rohraback, 15 Penn. St. 116 . . . . .	226, 227
Cleworth v. Pickford, 7 Mee. & W. 314 . . . . .	91
Clifford v. Richardson, 18 Vt. 620 . . . . .	207
Cloud v. Sledge, 1 Bailey, 105 . . . . .	245
Clussman v. Merkel, 3 Bosw. 402 . . . . .	146
Cock v. Gent, 13 Mee. & W. 310 . . . . .	614
Cockburn v. Newton, 2 Man. & Gr. 899, 9 Dowl. 676 . . . . .	348, 463, 626
Cockson v. Ogle, 1 Lutw. 550 . . . . .	340, 393, 410
Cocks v. Macclesfield, Dyer, 218 . . . . .	257
Codwise v. Hacker, 2 Caines, 251 . . . . .	81
Coffin v. Cottle, 4 Pick. 454 . . . . .	19, 70, 207
Cohen v. Hobenicht, 14 Richardson, Eq. 31 . . . . .	322, 453
Colecord v. Fletcher, 50 Maine, 398 . . . . .	60, 386, 389, 419
Coleman v. Grubb, 23 Penn. St. 393 . . . . .	15, 18

Coleman <i>v.</i> Wade, 2 Seld. (N. Y.) 44 . . . . .	487, 496, 523
Colkins, Adm'r of <i>v.</i> Partner of Thackston, Cam. & N. Conf. Rep. (N. C.) 93 . . . . .	67
Collet <i>v.</i> Podwell, 2 Keb. 670 . . . . .	404
Collins <i>v.</i> Collins, 28 L. J. Chy. 184 } <i>v.</i> Collins, 26 Beav. 306 }	40
<i>v.</i> Powell, 2 Term. 756 . . . . .	492
Collier <i>v.</i> Hicks, 2 Barn. & Ad. 663 . . . . .	130
Colwell <i>v.</i> Child, Ca. in Chy. 86, 1 Chy. R. 104 . . . . .	17
<i>v.</i> Child, Ca. in Chy. 86 . . . . .	376
Corneforth <i>v.</i> Geer, 2 Vern. 705 . . . . .	314
Combs <i>v.</i> Little, 3 Green, Ch. 310 . . . . .	111
<i>v.</i> Wyckoff, 1 Caines, 147 . . . . .	104, 105, 149
Commonwealth <i>v.</i> Norfolk, 5 Mass. 435 . . . . .	196
<i>v.</i> Pejepsut Prop's, 7 Mass. 399 . . . . .	61, 330, 398, 399, 402, 454, 507
<i>v.</i> City of Roxbury, 9 Gray, 451 . . . . .	300, 303, 330
Condon <i>v.</i> Southside R.R. Co., 14 Gratt. 302 . . . . .	38
Conger <i>v.</i> Dean, 3 Clarke (Iowa), 463 . . . . .	43
Conrad <i>v.</i> Johnson, 25 Ind. 487 . . . . .	283
<i>v.</i> Massasoit Ins. Co., 4 Allen, 20 . . . . .	101, 118, 121, 535
Cook <i>v.</i> Carpenter, 34 Vt. 121 . . . . .	178, 181, 208, 212
<i>v.</i> Jaques, 15 Gray, 59 . . . . .	213, 214, 599
<i>v.</i> Whorwood, 2 Saund. 337 . . . . .	185, 203, 456, 579
Cooley <i>v.</i> Dill, 1 Swan. 213 . . . . .	83
Coombs, <i>in re</i> , 4 Exch. 839 . . . . .	626
Cooper <i>v.</i> Hirst, 1 Lutw. 539 . . . . .	378
<i>v.</i> Langdon, 9 Mee. & W. 60, 1 Dowl. n. s. 392 . . . . .	450
<i>v.</i> Stinson, 5 Minn. 201 . . . . .	145
Cope <i>v.</i> Gilbert, 4 Denio, 347 . . . . .	162
Copeland <i>v.</i> Hall, 29 Maine, 93 . . . . .	52
Coppell <i>v.</i> Smith, 4 Term. 312 . . . . .	598
Coppin <i>v.</i> Hurnard, 2 Saund. 133 . . . . .	244
Coryell <i>v.</i> Coryell, Coxe, 385 . . . . .	149, 151
Countess of Portland <i>v.</i> Prodgers, 2 Vern. 104 . . . . .	28
Cowell <i>v.</i> Waller, 2 Barnard. 154 . . . . .	244
Cox <i>v.</i> Jagger, 2 Cow. 638 . . . . .	54, 164, 267, 379, 449, 463, 468, 511, 513, 519, 627
Crabtree <i>v.</i> Green, 8 Geo. 8 . . . . .	242
Craftsbury <i>v.</i> Hill, 28 Vt. 763 . . . . .	239
Craig <i>v.</i> Craig, 4 Halst. 198 . . . . .	73
Crammer <i>v.</i> Mathis, 2 Penning. 550 . . . . .	111, 112
Cramp <i>v.</i> Symons, 7 J. B. Moore, 434 . . . . .	214, 315
Cranston <i>v.</i> Kenny's Ex'rs, 9 Johns. 212 . . . . .	68, 294, 315, 333
Craven <i>v.</i> Craven, 7 Taunt. 642 . . . . .	216, 364, 586
Crawford <i>v.</i> Gable, 2 Barr. 444 . . . . .	77

Crawshay v. Collins, 3 Swanst. 90 . . . . .	162, 235, 236
Creswick v. Harrison, 10 C. B. 441 . . . . .	363
Crofoot v. Allen, 2 Wend. 495 . . . . .	156, 158
Crofts v. Harris, Carth. 187 . . . . .	398, 591
Cromer v. Churt, 15 Mee. & W. 310 . . . . .	614
Cromwell v. Owings, 6 Har. & J. 10 . . . . .	453
Crooper v. Buck, 41 Maine, 355 . . . . .	75
Crump v. Adney, 1 Cr. & Mee. 355 . . . . .	199
Culver v. Ashley, 17 Pick. 98 . . . . .	183, 212
v. Ashley, 19 Pick. 300 . . . . .	531
Cumberland v. North Yarmouth, 4 Greenl. 459 . . . . .	154, 159, 160, 224, 232, 333, 335
Cuncle v. Dripps, 3 Penn. 291 . . . . .	87
Cunningham v. Howell, 1 Iredell, 9 . . . . .	81
Curley v. Dean, 4 Conn. 259 . . . . .	487, 490, 507
Curry v. Lackey, 35 Mo. 389 . . . . .	39
Curtis v. Potts, 3 Maule & S. 145 . . . . .	225, 599
Cushing v. Babcock, 38 Maine, 452 . . . . .	69, 70, 81
Cushman v. Wooster, 45 N. H. 410 . . . . .	217, 297, 306, 307, 313
Cutter v. Carter, 29 Vt. 72 . . . . .	538, 540
v. Whittemore, 10 Mass. 442 . . . . .	31, 32, 172, 173
Cutting v. Stone, 23 Vt. 571 . . . . .	309

## D.

Daggy v. Cronnelly, 20 Ind. 474 . . . . .	110
Dale v. Mottram, 2 Barn. 291 . . . . .	203
Dalling v. Matchett, Willes, 215 . . . . .	156
Dalrymple v. Whittingham, 26 Vt. 345 . . . . .	196, 477, 478, 484
Dana v. Prescott, 1 Mass. 200 . . . . .	59
Dane v. Viscountess Kirkwall, 8 C. & P. 679 . . . . .	26
Daniel v. Daniel's Adm'r, 6 Dana, 98 . . . . .	245
v. Daniel, 6 Dana, 93 . . . . .	245, 247
Daniels v. Willis, 7 Minn. 374 . . . . .	87
Darbey v. Whitaker, 4 Drew. 134 . . . . .	90
Darge v. Horicon Mining Co., 22 Wis. 691 . . . . .	350, 431
Darling v. Darling, 16 Wis. 644 . . . . .	264
Dater v. Wellington, 1 Hill, 319 . . . . .	9, 537
Daubuz v. Rickman, 4 Dowl. 129 . . . . .	625
Davis v. Campbell, 23 Vt. 236 . . . . .	70, 207
v. Forshee, 34 Ala. 107 . . . . .	105
v. Rea, Cas. temp. Finch, 441 . . . . .	519
Davies v. Pratt, 17 C. B. 183 . . . . .	277, 327, 333, 544
v. Pratt, 25 L. J. C. P. 71 . . . . .	277
v. Price, 10 W. R. 865 . . . . .	173

Davy's Ex'ors <i>v.</i> Faw, 7 Cranch, 171 . . . . .	56, 360
Dawney <i>v.</i> Vesey, 2 Vent. 249 . . . . .	427, 554
Day <i>v.</i> Bonnin, 3 Bing. N. C. 219 . . . . .	364, 487
<i>v.</i> Essex County Bank, 13 Vt. 97 . . . . .	96
<i>v.</i> Hooper, 51 Maine, 178 . . . . .	431, 463, 627
<i>v.</i> Laflin, 6 Metc. (Mass.) 280 . . . . .	273, 375, 402
<i>v.</i> Smith, 1 Dowl. 460 . . . . .	580
Deerfield <i>v.</i> Arms, 20 Pick. 480 . . . . .	480
De Groot <i>v.</i> United States, 5 Wall. 419 . . . . .	228, 238, 474, 475
Delafield <i>v.</i> De Grauw, 9 Bosw. 1 . . . . .	145
De la Riva <i>v.</i> Berreyesa, 2 Cal. 195 . . . . .	137, 207
Delesline <i>v.</i> Greenland, 1 Day, 458 . . . . .	43
De Lisle <i>v.</i> Priestman, 1 Brown, 115 . . . . .	77
Delong <i>v.</i> Stanton, 9 Johns. 38 . . . . .	63, 65, 66, 294, 316, 332, 542
Delver <i>v.</i> Barnes, 1 Taunt. 48 . . . . .	216, 218, 219, 323
Dennis <i>v.</i> Barber, 4 Binney, 484 . . . . .	484
Deputy <i>v.</i> Betts, 4 Harrington, 352 . . . . .	111, 150
Detroit <i>v.</i> Jackson, 1 Dougl. 106 . . . . .	13
Dexter <i>v.</i> Young, 40 N. H. 130 . . . . .	232, 233, 238
Dibblee <i>v.</i> Best, 11 Johns. 103 . . . . .	277
Dicas <i>v.</i> Jay, 6 Bing. 519 . . . . .	492
Dick <i>v.</i> Milligan, 2 Ves. 23 . . . . .	215, 316
Dickerson <i>v.</i> Lynn, 4 Blackf. 253 . . . . .	575
Dickey <i>v.</i> Sleeper, 13 Mass. 244 . . . . .	23, 32
Diedrich <i>v.</i> Richley, 2 Hill, 271 . . . . .	13, 43, 44, 68
Dimsdale <i>v.</i> Robertson, 2 Jones & La. 58 . . . . .	91
Dinsmore <i>v.</i> Smith, 17 Wis. 20 . . . . .	105
Dix <i>v.</i> Town of Dummerston, 19 Vt. 262 . . . . .	6
Dobson <i>v.</i> Groves, 6 Q. B. 637 . . . . .	126, 170, 172, 569, 570
Dodge <i>v.</i> Waterbury, 8 Cow. 136 . . . . .	68
Dod <i>v.</i> Herbert, Sty. 459½ . . . . .	490, 588
<i>v.</i> Herring, 3 Sim. 143 . . . . .	}
<i>v.</i> Herring, appealed, 1 Russ. & M. 135 . . . . .	
Doddington <i>v.</i> Bailward, 7 Dowl. 640 . . . . .	559
<i>v.</i> Hudson, 1 Bing. 384, 410 . . . . .	122, 145, 559
Doe d. Body <i>v.</i> Cox, 4 Dowl. & Low. 75 . . . . .	469
Doe d. Duke of Beaufort <i>v.</i> Weld, 3 Man. & Gr. 271 . . . . .	512
Doe d. Chawner <i>v.</i> Boulter, 6 Ad. & El. 675 . . . . .	520
Doe d. Clarke <i>v.</i> Stilwell, 8 Ad. & El. 645 . . . . .	195, 550
Doe d. Harris <i>v.</i> Saunder, 5 Ad. & El. 664 . . . . .	512
Doe d. Haxby <i>v.</i> Preston, 3 Dowl. & Low. 768 . . . . .	570
Doe d. Lloyd <i>v.</i> Evans, 3 C. & P. 219 . . . . .	567
Doe d. Madkins <i>v.</i> Horner, 8 Ad. & El. 235 . . . . .	362, 488
Doe d. Moody <i>v.</i> Squire, 2 Dowl. (N. S.) 327 . . . . .	584
Doe d. Morris <i>v.</i> Rosser, 3 East, 15 . . . . .	55, 488, 511, 513
Doe d. Smith <i>v.</i> Webber, 1 Ad. & El. 119 . . . . .	519



Doe d. Turnbull v. Brown, 5 Barn. & Cr. 384 . . . . .	613
Doe d. Williams v. Richardson, 8 Taunt. 677 . . . . .	192, 465
Doke v. James, 4 Comst. 567 . . . . .	226, 463
Dolbier v. Wing, 3 Greenl. 421 . . . . .	349, 362
Dole v. Dawson, 2 Keb. 878 . . . . .	278
Dorman v. The Turnpike Co., 3 Watts, 126 . . . . .	172
Douglas v. Kenton, 1 Miles, 21 . . . . .	77
Downer v. Downer, 11 Vt. 371 . . . . .	214, 217
Downs v. Cooper, 2 Q. B. 256 . . . . .	55, 520
Dowse v. Coxe, 3 Bing. 20 . . . . .	17, 340, 343, 375, 579
Doyle v. Reilly, 18 Iowa, 108 . . . . .	433
Doyley v. Benton, 1 Ld. Raym. 533 . . . . .	192, 548, 585, 586
Dresser v. Stansfield, 14 Mee. & W. 822 . . . . .	585, 594
Drew v. Drew, House of Lords, March 8, 1855, cited in Russell on Arb. 3d ed. p. 106 . . . . .	101, 104, 126, 129
v. Leburn, 2 Macq. 1 . . . . .	171
v. Mullikin, 5 N. H. 153 . . . . .	105
Dudgeon v. Martin, 1 McQueen, House of Lords, 714 . . . . .	487
Dudley v. Mallery, 3 Leon. 62 . . . . .	203, 204
v. Nettlefold, 2 Stra. 737 . . . . .	625
Duke of Beaufort v. Swansea Harbor Trustees, 29 L. J. C. P. 241 . . . . .	363
v. Welch, 10 Ad. & El. 527 . . . . .	451
Duke of Northumberland v. Errington, 5 Term, 522 . . . . .	579
Dundon v. Starin, 19 Wisc. 261 . . . . .	627
Dunn v. Murray, 9 Barn. & Cr. 780 . . . . .	492
Duport v. Wildgoose, 2 Bulstr. 260 . . . . .	432
Duquid v. Ogilvie, 3 E. D. Smith, 527 . . . . .	145
Duren v. Getchell, 55 Maine, 241 . . . . .	28, 490, 507, 541, 542, 596, 600
Dyer v. Dawson, 1 Coop. C. C. 420, notes . . . . .	602

## E.

Eads v. Williams, 24 L. J. Chy. 531 . . . . .	144, 153, 165, 169, 606, 667
Eardley v. Otley, 2 Chitt. 42 . . . . .	615
v. Steer, 4 Dowl. 423 . . . . .	164, 252
Earl of Mexborough v. Bower, 7 Beav. 127 . . . . .	90
Earle v. Stocker, 2 Vern. 251 . . . . .	100, 108, 145, 543, 613
Eastern Counties' Railway Co. v. Robertson, 6 Man. & Gr. 38 . . . . .	136, 138
Eastern Union Railway Co. v. Eastern Counties Railway Co., 2 El. & Bl. 530 . . . . .	199
Eastham v. Tyler, 2 Bail Court Rep. 136 . . . . .	120
Eastman v. Burleigh, 2 N. H. 484 . . . . .	7, 8, 31, 164
Eaton v. Arnold, 9 Mass. 519 . . . . .	73, 576
v. Cole, 1 Fairf. 137 . . . . .	19

Eaton v. Hall, 5 Metc. 287 . . . . .	601
v. Rice, 8 N. H. 378 . . . . .	51, 516
Eddy v. Sprague, 10 Vt. 216 . . . . .	70, 207, 208
Edmunds v. Cox, 2 Chitt. 432 . . . . .	234
Edmundson v. Hartley, 1 Anst. 97 . . . . .	610
Edwards v. Stevens, 1 Allen, 315 . . . . .	341, 345, 502
Efner v. Shaw, 2 Wend. 567 . . . . .	42, 63, 338, 579
Elborough v. Gates, 2 Lev. 68 . . . . .	586
Elkins v. Page, 45 N. H. 310 . . . . .	332, 612
Ellis v. Arnison, 5 Barn. & Ald. 47 . . . . .	512
v. Hopper, 28 L. J. Exch. 1 . . . . .	105
v. Saltau, 4 C. & P. 327 . . . . .	569
Elliot v. Cheval, 1 Lutw. 541 . . . . .	244, 380
v. Davis, 2 Bos. & P. 338 . . . . .	32
Elliott v. Heath, 14 N. H. 131 . . . . .	525
v. Quimby, 13 N. H. 181 . . . . .	75, 76, 80
Elmendorf v. Harris, 23 Wend. 628 . . . . .	118, 120, 125, 246
Elsom v. Rolfe, 2 Smith, 459 . . . . .	356, 594
Elvin v. Drummond, 1 M. & P. 88 } . . . . .	42
v. Drummond, 4 Bing. 415 }	
Emerson v. Udall, 8 Vt. 357 . . . . .	120, 234
v. Udall, 13 Vt. 477 . . . . .	540, 544
Emery v. Emery, Cro. Eliz. 726 . . . . .	397
v. Fowler, 38 Maine, 99 . . . . .	14, 519
v. Hitchcock, 12 Wend. 156 . . . . .	354, 422, 423, 542
v. Wase, 5 Ves. Jr. 846 . . . . .	28, 167, 464, 608
v. Wase, 8 Ves. Jr. 504 . . . . .	185
Emmet v. Hoyt, 17 Wend. 410 . . . . .	537
England v. Davison, 9 Dowl. n. s. 1052 . . . . .	481, 483
Erie v. Tracy, 2 Grant's Ca. 20 . . . . .	230
Estanson v. Dupuy, 2 Browne, 100 . . . . .	59
Estep v. Larsh, 16 Ind. 82 . . . . .	46, 59
Estes v. Mansfield, 6 Allen, 69 . . . . .	303
European & American Steam Shipping Co. v. Croskey, 8 C. B. n. s. 397 . . . . .	243
Evans v. Cogan, 2 P. Wms. 450 . . . . .	607, 608
v. Harris, 2 Ves. & B. 361, 364 . . . . .	610
v. M'Kinsey, Litt. Sel. Ca. 262 . . . . .	43, 51, 52
v. Pratt, 3 Man. & Gr. 759 . . . . .	295
v. Rees, 10 Ad. & El. 151 . . . . .	519
Eveleth v. Chase, 17 Mass. 458 . . . . .	82, 564
Everard v. Paterson, 6 Taunt. 625 . . . . .	260, 585
Ewes v. Blackwall, Cas. temp. Finch, 22 . . . . .	606
Ewing v. Beauchamp, 3 Bibb, 41 . . . . .	294
Ewing's Administrators v. Beauchamp, 2 Bibb, 456 . . . . .	294, 536
Executors of Baracliff v. Adm'rs of Griscom, Cox (N. J.) 165 . . . . .	21

Eyre's Ex'or v. Fennimore, 2 Penning. 932 . . . . .	135, 141
Executors of Finney v. Miller, 1 Bailey, 81 . . . . .	242
Eyre v. Good, 2 Rep. in Chy. 18, 34 . . . . .	605

## F.

Fairchild v. Adams, 11 Cush. 547 . . . . .	300, 308, 309, 315, 316, 566
Falconer v. Montgomery, 4 Dall. 232 . . . . .	247
Farmer v. Frey, 4 McCord, 160 . . . . .	234
v. Stewart, 2 N. H. 97 . . . . .	119
Farrer v. Billing, 2 Barn. & Ald. 171 . . . . .	512
Farringdon v. Chute, 1 Vern. 72 . . . . .	507, 609
Farrington v. Hamblin, 12 Wend. 212 . . . . .	81
Faunce v. Burke, 16 Penn. St. 480 . . . . .	92
Faviell v. Eastern Counties Railway Co., 2 Exch. 344 . . . . .	17, 19, 299
Fay v. Bond, 1 Allen, 211 . . . . .	375
Fennimore v. Childs, 1 Halst. 386 . . . . .	135, 141
Fenton v. Dimes, 7 Mee. & W. 134 . . . . .	351
Fernley v. Branson, 20 L. J. Q. B. 178 . . . . .	626
Ferrer v. Oven, 7 Barn. & Cress. 427 . . . . .	574, 582, 600
Ferris v. Munn, 2 N. J. 161 . . . . .	232
Ferson v. Drew, 19 Wis. 225 . . . . .	332, 620
Fetherstone v. Cooper, 9 Ves. Jr. 67 . . . . .	107, 116, 117, 127, 170, 275
Fidler v. Cooper, 19 Wend. 285 . . . . .	31, 487, 495, 505
Fielding v. Westemeier, 20 La. An. 51 . . . . .	73
Filmer v. Delber, 3 Taunt. 486 . . . . .	18
Findley v. Ray, 5 Jones, Law, 125 . . . . .	36
Fink v. Fink, 8 Clarke, 313 . . . . .	43, 46, 48
Finley v. Finley, 11 Mis. 624 . . . . .	542, 588
Finney's Ex'ors v. Miller, 1 Bailey, 81 . . . . .	242
Firth v. Robinson, 1 Barn. & Cr. 277 . . . . .	463, 623
Fisher v. Pimbley, 11 East, 188 . . . . .	590, 593, 599
Fiske v. South Wilbraham Manuf. Co., 7 Allen, 476 . . . . .	446, 447
Fitzgerald v. Fitzgerald, Hardin, 227 . . . . .	72, 226, 626
Fletcher v. Hubbard, 43 N. H. 58 . . . . .	332, 542, 543, 595, 612
v. Webster, (cited in chap. "Award must be certain," 390) . . . . .	422
Forbes v. Frary, 2 Johns. Ca. 224 . . . . .	151
Ford v. Ford, 53 Barb. 525 . . . . .	209, 210
v. Jones, 3 B. & Ad. 248 . . . . .	243
v. Keen, 13 Penn. St. 179 . . . . .	50, 80
v. Potts, 1 Halst. 393 . . . . .	111, 112
Foreland v. Marygold, 1 Salk. 72 . . . . .	587
Forseth v. Shaw, 10 Mass. 253 . . . . .	71
Forsley v. Galveston, Houston & Henderson R.R. Co., 16 Tex. 516 . . . . .	46
Forrest v. Forrest, 3 Bosw. 650 . . . . .	148
v. Kissam, 7 Hill, 463 . . . . .	150

Fort v. Battle, 13 Sm. & M. 133 . . . . .	25, 27
Forster v. Durant, 2 Cush. 544 . . . . .	263
Fowler v. Bigelow, 8 Mass. 1 . . . . .	58
v. Thayer, 4 Cush. 111 . . . . .	142
Fox v. Eales, 2 Miles, 169 . . . . .	49
v. Hazelton, 10 Pick. 275 . . . . .	101, 102, 103, 104, 108, 172
v. Smith, 2 Wils. 267 . . . . .	417
Francisco v. Fitch, 25 Barb. 130 . . . . .	59
Frazer v. Phelps, 3 Sandf. 741 . . . . .	132
Freeborn v. Denman, 3 Halst. 116 . . . . .	234
Freeman v. Adams, 9 Johns. 115 . . . . .	85
v. Barnard, 1 Ld. Raym. 247 . . . . .	427
v. Bernard, 1 Salk. 69 . . . . .	184, 279, 424, 438, 546, 582, 591
v. Drew, Cro. Eliz. 181 . . . . .	553
v. Sheen, Cro. Jac. 339 . . . . .	554, 555
French v. Moseley, 1 Litt. 248 . . . . .	112, 226
v. New, 20 Barb. 481 . . . . .	48, 51, 52, 83, 174, 233
v. Richardson, 5 Cush. 450 . . . . .	28, 56, 57, 334
Frets v. Frets, 1 Cow. 335 . . . . .	232, 233, 238, 239
Frissell v. Fickes, 27 Mis. 557 . . . . .	113
Fryeburg Canal, Prop's of v. Frye, 5 Greenl. 38 . . . . .	56
Fryer v. Shaw, 27 L. J. Exch. 320 . . . . .	145
Fuller v. Fenwick, 3 C. B. 705 . . . . .	220, 295, 298, 310, 315, 323
v. Wheelock, 10 Pick. 135 . . . . .	135, 139, 140, 141, 142, 402
Fulton v. Wiley, 32 Vt. 762 . . . . .	207, 209
Furber v. Chamberlain, 29 N. H. 405 . . . . .	13, 51, 65, 516
Furbish v. Hall, 8 Maine (Greenl.), 315 . . . . .	7, 380, 381
Furlong v. Thornigold, 12 Mod. 533 . . . . .	453, 456, 587
Furnival v. Bogle, 4 Russ. 142 . . . . .	17, 18
Furser v. Prowd, Cro. Jac. 423 . . . . .	399, 548

## G.

Gable v. Moss, 1 Bulst. 44 . . . . .	546, 588
Gaby v. Wilts Canal Co., 3 Maule & S. 580 . . . . .	310
Gaffney v. Killen, 12 Ir. C. L. Rep. App. XXV. . . . .	527
Galloway's Heirs v. Webb, Hardin, 318 . . . . .	105
Galvin v. Thompson, 13 Maine, 367 . . . . .	210, 597
Gan v. Gomez, 9 Wend. 649 . . . . .	40
Garcie v. Sheldon, 3 Barb. 232 . . . . .	71
Garr v. Gomez, 9 Wend. 649 . . . . .	586
Garred v. Macey, 10 Mo. 161 . . . . .	39
Garret v. Weeden, 1 Lev. 133 . . . . .	279
Gartside v. Gartside, 3 Anst. 735 . . . . .	540, 610, 613, 614
Gascoyne v. Edwards, 1 Younge & Jer. 19 . . . . .	591

<i>Gatliffe v. Dunn</i> , Barnes, 55 . . . . .	263
<i>Genne v. Tinker</i> , 3 Lev. 24 . . . . .	579, 590, 597
<i>Gensham v. Germain</i> , 11 Moore, 1 . . . . .	295, 298
<i>George v. Farr</i> , 46 N. H. 171 . . . . .	83, 85
<i>v. Johnson</i> , 45 N. H. 456 . . . . .	521, 522
<i>v. Lonsley</i> , 8 East, 12 . . . . .	276, 278, 626
<i>Gerrish v. Ayres</i> , 3 Scam. 245 . . . . .	59
<i>Gervais v. Edwards</i> , 2 Dru. & War. 80 . . . . .	603
<i>Giddings v. Hadaway</i> , 28 Vt. 342 . . . . .	354, 431, 455, 458, 467, 483
<i>Gill v. Russell</i> , Freem. 62 . . . . .	25
<i>Gillon v. Mersey Nav. Co., in re</i> , 3 Barn. & Ad. 493 . . . . .	180
<i>Gilmore v. Hubbard</i> , 12 Cush. 220 . . . . .	182, 458
<i>Girdler v. Carter</i> , 47 N. H. 305 . . . . .	487, 490, 507, 510, 511, 555
<i>Gisborne v. Hart</i> , 5 Mee. & W. 50 . . . . .	599, 601
<i>Gladwin v. Chilcote</i> , 9 Dowl. 550 . . . . .	122, 145
<i>Glover v. Barrie</i> , 1 Salk. 71 . . . . .	180, 393
<i>Goddard v. Mansfield</i> , 19 L. J. Q. B. 305 . . . . .	392
<i>Godfrey v. Wade</i> , 6 Moore, 488 . . . . .	4
<i>Goff v. Musser</i> , 2 Serg. & R. 262 . . . . .	73
<i>Goldsmith's Administrator v. Tilly</i> , 1 Harris & J. 361 . . . . .	316, 322, 336, 613
<i>Goldstone v. Osborn</i> , 2 Car. & P. 550 . . . . .	93
<i>Goleman v. Turner</i> , 14 Sm. & M. 118 . . . . .	25
<i>Golightly v. Jellicoe</i> , 4 Term, 146, n. . . . .	493, 505, 572
<i>Gonsales v. Deavens</i> , 2 Yeates, 539 . . . . .	437, 446, 447
<i>Goodall v. Cooley</i> , 9 Foster, 48 . . . . .	119
<i>Goodman v. Sayers</i> , 2 J. & W. 242 . . . . .	156, 170, 511, 619
<i>Goodridge v. Dustin</i> , 5 Metc. (Mass.) 363 . . . . .	511, 514
<i>Goodson v. Brooke</i> , 4 Camp. 163 . . . . .	11, 12
<i>Goodyear v. Simpson</i> , 15 Mee. & W. 16 . . . . .	37
<i>Gordon v. Mitchell</i> , 3 Moore, 241 . . . . .	562
<i>v. Tucker</i> , 6 Maine, 247 . . . . .	455, 463, 475, 627
<i>Gourlay v. Duke of Somerset</i> , 19 Ves. Jr. 431 . . . . .	90
<i>Gould v. Staffordshire Potteries Water-works Co.</i> , 5 Exch. 214 . . . . .	369
<i>v. Ward</i> , 4 Pick. 104 . . . . .	448
<i>Gove v. Richardson</i> , 4 Greenl. 327 . . . . .	51, 517
<i>Govett v. Richmond</i> , 7 Sim. 1 . . . . .	608
<i>Graham v. Graham</i> , 9 Penn. St. 254 . . . . .	59, 64, 83, 121, 242, 243, 247
<i>v. Hamilton</i> , 1 Binn. 461 . . . . .	112
<i>v. Morton</i> , 6 Wend. 552 . . . . .	149
<i>Gray v. Berry</i> , 9 N. H. 473 . . . . .	51, 516
<i>v. Gray</i> , Roll's Abr. Arb. E. 6, p. 247 . . . . .	203, 410
<i>v. Gray</i> , Cro. Jac. 525 . . . . .	269, 549
<i>v. Gwennap</i> , 1 Barn. & Ald. 106 . . . . .	349, 364, 423
<i>v. Wilson</i> , 4 Watts, 39 . . . . .	91
<i>Grazebrook v. Davis</i> , 5 Barn. & Cress. 534 . . . . .	542
<i>Greason v. Keteltas</i> , 17 N. Y. 491 . . . . .	89

Greathead <i>v.</i> Moreley, 3 Man. & Gr. 139 . . . . .	512
Green <i>v.</i> Creighton, 7 Sm. & M. 197 . . . . .	141
<i>v.</i> Ford, 17 Ark. 586 . . . . .	52, 54, 602
<i>v.</i> Lundy, Cox, 435 . . . . .	227, 330
<i>v.</i> Miller, 6 Johns. 39 . . . . .	156, 158, 162
<i>v.</i> Patcher, 13 Wend. 293 . . . . .	68, 74
<i>v.</i> Pole, 6 Bing. 443 . . . . .	229, 230
<i>v.</i> Waring, 1 Wm. Bl. 474 . . . . .	186
Greenough <i>v.</i> Rolfe, 4 N. H. 357 . . . . .	217, 294, 297, 302, 307, 315
Greenwood <i>v.</i> Titterton, <i>in re</i> , 9 Ad. & El. 699 . . . . .	243
Gregory <i>v.</i> Howard, 3 Esp. 113 . . . . .	567
Greig <i>v.</i> Talbot, 2 Barn. & Cress. 179 . . . . .	582
Grenfell <i>v.</i> Edgcome, 7 Q. B. 661 . . . . .	199, 451, 624
Grier <i>v.</i> Grier, 1 Dall. 173 . . . . .	426
Griffin <i>v.</i> Hadley, 8 Jones, Law. 82 . . . . .	458
Griggs <i>v.</i> Seeley, 8 Ind. 264 . . . . .	29
Grindley <i>v.</i> Barker, 1 Bos. & Pul. 229 . . . . .	162
Griswold <i>v.</i> North Stonington, 5 Conn. 367 . . . . .	6
Grove <i>v.</i> Cox, 1 Taunt. 165a . . . . .	623
Grubb <i>v.</i> Grubb's Ex'ors, 2 Dall. 191 . . . . .	77
<i>v.</i> McCullough, 1 Yeates, 193 . . . . .	77
Gunter <i>v.</i> Sanchez, 1 Cal. 45 . . . . .	49, 73
Gunton <i>v.</i> Nurse, 5 Moore, 259 . . . . .	520
Gyde <i>v.</i> Boucher, 5 Dowl. 127 . . . . .	363

## H.

Habershon <i>v.</i> Troby, 3 Esp. 38 . . . . .	216, 568
Haidan <i>v.</i> Roupell, 9 C. B. N. s. 683 . . . . .	93
Haff <i>v.</i> Blossom, 5 Bosw. 559 . . . . .	167
Haggart <i>v.</i> Morgan, 5 N. Y. 422 . . . . .	91, 491
Hagger <i>v.</i> Baker, 14 Mee. & W. 9 . . . . .	135, 136, 295, 325, 326
Hagh <i>v.</i> Chadwick, 2 Keb. 667 . . . . .	597
Hagner <i>v.</i> Musgrove, 1 Dall. 83 . . . . .	117
Haigh <i>v.</i> Haigh, 31 L. J. Chy. 420 . . . . .	115, 116, 128, 129, 131, 145, 173
Hale <i>v.</i> Handy, 26 N. H. 206 . . . . .	37
<i>v.</i> Huse, 10 Gray, 99 . . . . .	214, 566, 571
Halfhide <i>v.</i> Fenning, 2 Bro. C. C. 336 . . . . .	131
Hall <i>v.</i> Anderton, <i>in re</i> , 8 Dowl. 326 . . . . .	122, 146
<i>v.</i> Decker, 51 Maine, 31 . . . . .	214
<i>v.</i> Hall, 3 Conn. 308 . . . . .	224
<i>v.</i> Hardy, 3 P. Wms. 187 . . . . .	603, 605, 606
Hall & Hinds, <i>in re</i> , 2 Man. & Gr. 847 . . . . .	229, 324, 325, 326, 327, 337, 539
Hallack <i>v.</i> March, 25 Ill. 48 . . . . .	8
Halloran <i>v.</i> Bray, 29 Geo. 422 . . . . .	44

Hamilton v. Hamilton, 27 Ill. 158 . . . . .	46
v. Rankin, 3 De Gex & S. 782 . . . . .	15, 128
Hampton v. Boyer, Cro. Eliz. 557 . . . . .	582
Hannum's Heirs v. Wallace, 9 Humph. 129 . . . . .	25
Hanson v. Boothman, 13 East, 21 . . . . .	548
v. Liversedge, 2 Vent. 242 . . . . .	219, 256, 389, 416, 588
v. Webber, 40 Maine, 194 . . . . .	255, 383, 404, 414, 463, 560, 627
Harcourt v. Ramsbottom, 1 Jac. & Walk. 512 . . . . .	123
Harden v. Harden, 11 Gray. 435 . . . . .	363, 627, 629
Harding, <i>ex parte</i> , 5 De Gex, M. & G. 367 . . . . .	529
v. Forshaw, 1 Mee. & W. 415 . . . . .	348
v. Holmes, 1 Wils. 122 . . . . .	592
v. Wallace, 8 B. Monr. 536 . . . . .	121, 226
v. Watts, 15 East, 556 . . . . .	243, 244
Hardy v. Ringrose, 1 H. & W. 185 . . . . .	323
v. Innes, 6 Moore, 575 . . . . .	314
Hare, <i>in re</i> , 6 Bing. N. C. 158 . . . . .	170, 537, 572
v. Fleay, 11 C. B. 472 . . . . .	203, 428
Harker v. Hough, 2 Halst. 428 . . . . .	340, 345, 353
Harmon v. Jennings, 22 Maine, 240 . . . . .	45, 59, 72
Harris v. Bradshaw, 18 Johns. 26 . . . . .	68
v. Hayes, 6 Binn. 422 . . . . .	47
v. Knipe, 1 Lev. 58 . . . . .	380, 456
v. Norton, 7 Wend. 534 . . . . .	151, 153, 154
v. Paynter, Rolfe's Abr. Arb., O. 8, p. 261 . . . . .	353
v. Wilson, 1 Wend. 511 . . . . .	496
Harries v. Thomas, 2 Mee. & W. 32 . . . . .	476
Harrison v. Lay, 13 C. B. N. s. 528 . . . . .	197, 312, 364, 459
v. Creswick, 13 C. B. 399 . . . . .	349, 594
v. Wortham, 8 Leigh, 296 . . . . .	72, 210
Harrington v. Brown, 9 Allen, 579 . . . . .	53, 627
v. Higham, 13 Barb. 660 . . . . .	8, 9
v. Rich, 6 Vt. 666 . . . . .	151, 225
Hart v. Lauman, 29 Barb. 410 . . . . .	491
v. Trotter, 4 Wend. 198 . . . . .	81
Hartnell v. Hill, Forrest, 73 . . . . .	254, 623
Hartshorne v. Cuttrel, 1 Green's Chy. 297 . . . . .	321, 322, 336, 337, 536, 586
Harvey v. Ashley, 3 Atk. 607 . . . . .	4, 607
v. Shelton, 7 Beav. 455 . . . . .	133, 127, 128, 170
v. Snow, 1 Yeates, 156 . . . . .	630
Haskell v. Whitney, 12 Mass. 47 . . . . .	73, 232
Haswell v. Thorogood, 7 Barn. & Cr. 705 . . . . .	528
Hatton v. Royle, 3 Hurl. & N. 500 . . . . .	10
Haven v. Winnisimmet Co., 11 Allen, 377 . . . . .	241, 242
Hawkins v. Benton, 2 Dowl. & Low. 465; 8 Q. B. 479 . . . . .	33, 427
v. Colclough, 1 Burr. 275 . . . . .	362, 380, 408

Hawks v. Crofton, 2 Burr. 698 . . . . .	254
Hawksworth v. Brammall, 5 M. & Cr. 281 . . . . .	356, 361, 605
Hawkyard v. Stocks, 2 Dowl. & Low. 936 . . . . .	454, 457, 469
Hawley v. Hodge, 7 Vt. 237 . . . . .	233, 239, 628
Hay v. Brown, 12 Wend. 591 . . . . .	558
Hayes v. Bennett, 2 N. H. 422 . . . . .	47
v. Blanchard, 4 Vt. 210 . . . . .	78
v. Forskoll, 31 Maine, 112 . . . . .	179, 181, 191, 350, 362, 446
v. Hayes, Cro. Car. 433 . . . . .	32
Hayllar v. Ellis, 3 N. & P. 553 . . . . .	364
Hayman v. Jerrard, 1 Saund. 102 . . . . .	589
Haynes v. Wright, 4 Hayw. 64 . . . . .	16
Hays v. Hays, 23 Wend. 363 . . . . .	63, 106
Hayward v. Phillips, 6 Ad. & El. 119 . . . . .	199
Hazeltine v. Smith, 3 Vt. 535 . . . . .	214, 217, 229, 307
Hazen v. Adm'rs of Addis, 2 Green, 333 . . . . .	71, 77, 80
Heard v. Baskerville, Hob. 232 . . . . .	590
Hedrick v. Judy, 23 Ind. 548 . . . . .	259
Hemans v. Picciolto, 1 C. B. N. s. 646 . . . . .	93
Heming v. Swinnerton, 1 Coop. C. C. 420 . . . . .	602, 615
Hemsworth v. Brian, 1 C. B. 131 . . . . .	180, 527, 528, 626
Henderson v. Walker, 2 Grant (Penn.), 36 . . . . .	72
v. Williamson, 1 Strange, 116 . . . . .	261, 585
Henfree v. Bromley, 6 East, 309 . . . . .	226, 288
Henley v. Soper, 8 Barn. & C. 16 } . . . . .	11, 13
v. Soper, 2 M. & R. 155 }	
Henneigh v. Kramer, 50 Penn. St. 530 . . . . .	85, 175
Henrickson v. Reinback, 33 Ill. 299 . . . . .	374, 412, 418, 446
Henry v. Kirwan, 9 Ir. C. L. 459 . . . . .	511, 605
Herrick v. Blair, 1 Johns. 101 . . . . .	117, 126
Heslep v. San Francisco, 4 Cal. 1 . . . . .	75
Hetley v. Hetley, Kyd on Awards, p. 100 . . . . .	122
Hewitt v. Furman, 16 Serg. & R. 135 . . . . .	356, 358, 362, 363, 434, 435, 631
v. Hewitt, 1 Q. B. 110 . . . . .	421, 432
v. Portsmouth Waterworks Co., 10 W. R. 780 . . . . .	122
Hewlett v. Laycock, 2 Car. & Payne, 574 . . . . .	115, 121, 128, 129, 172
Hickes v. Cracknell, 3 Mee. & W. 72 . . . . .	593
Hicks v. Cottrell, 25 Vt. 80 . . . . .	208
v. Gleason, 20 Vt. 139 . . . . .	352, 414
v. Richardson, 1 Bos. & P. 93 . . . . .	282
Hide v. Cooth, 2 Vern. 109 . . . . .	340
v. Pettit, 1 Ca. in Ch. 185 . . . . .	230, 342
Higgins v. Kinneady, 20 Iowa, 474 . . . . .	262, 264, 328
v. Willes, 3 M. & R. 382 . . . . .	420, 422
Higham v. Jessop, in re, 9 Dowl. 203 . . . . .	225
Hill v. Ball, 1 Dow, N. s. 164 . . . . .	316



Hill v. Hill, 11 Sm. & Mar. 616 . . . . .	118, 121
v. Page, 1 N. H. 190 . . . . .	47
v. Taylor, 15 Wis. 190 . . . . .	47, 83, 85
v. Thorne, 2 Mod. 309 . . . . .	193, 465
Hinton v. Cray, 3 Keb. 512 . . . . .	263, 585, 594
Hix v. Sumner, 50 Maine, 290 . . . . .	71
Hobbs v. Ferrars, 8 Dowl. 779 . . . . .	613
Hobdell v. Miller, 6 Bing. N. C. 292 . . . . .	538
Hobler, <i>in re</i> , 8 Beav. 101 . . . . .	17
Hobson v. Stewart, 4 Dowl. & Low. 589 . . . . .	378
Hodge v. Burgess, 3 Hurl. & Nor. 293 . . . . .	295, 325
Hodges v. Hodges, 9 Mass. 320 . . . . .	356, 362, 364, 503
v. Raymond, 9 Mass. 316 . . . . .	254
v. Saunders, 17 Pick. 470 . . . . .	524, 603
Hodgkinson v. Fernie, 27 L. J. C. P. 66 . . . . .	295, 323
Hodsden v. Harridge, 2 Saund. 62 . 290, 490, 574, 578, 580, 584, 588, 598	
Hodson v. Drewry, 7 Dowl. 569 . . . . .	243
Hoff v. Taylor, 2 Southard, 829 . . . . .	153
Hoffmann v. Locke, 7 Harris, 57 . . . . .	58, 78
Holdsworth v. Borsham, 31 L. J. Q. B. 145 . . . . .	389, 416, 577
v. Wilson, 32 L. J. Q. B. . . . .	389, 416, 577
Holgate v. Killick, 7 Hurl. & Nor. 418 . . . . .	564
Holker v. Parker, 7 Cranch, 452 . . . . .	15
Hollingsworth v. Leiper, 1 Dall. 161 . . . . .	117, 141, 217
v. Pickering, 24 Ind. 435 . . . . .	418
Holmes v. Higgins, 1 Barn. & Cr. 74 . . . . .	313
Holt v. Ward, Fitzgibbon, 175, 275 . . . . .	4
Hood v. Hartshorn, 100 Mass. 117 . . . . .	94
Hoogs v. Morse, 31 Cal. 128 . . . . .	175
Hooper v. Hooper, McLel. & Y. 509 . . . . .	199
v. Pierce, 12 Mod. 116 . . . . .	193, 465
v. Taylor, 39 Maine, 224 . . . . .	135, 138, 140
Hopcraft v. Hickman, 2 Sim. & St. 130 . . . . .	168, 395, 420, 422, 608
Hopper v. Hackett, 1 Lev. 132 . . . . .	380
Hopson v. Doolittle, 13 Conn. 236 . . . . .	59, 64
Horn v. Roberts, 1 Ashm. 45 . . . . .	77, 78
Horton v. Benson, Freem. 204 . . . . .	378
v. Wilde, 8 Gray, 425 . . . . .	8
Houghton v. Burroughs, 18 N. H. 499 . . . . .	276, 279, 280, 282, 283, 290
v. Houghton, 37 Maine, 72 . . . . .	529, 588
v. Houghton, 37 Maine, 72 . . . . .	47, 52
House v. Lauder, 1 Lev. 85 . . . . .	592
Houston v. Pollard, 9 Metc. 164 . . . . .	265, 358, 360, 367, 424
Howard v. Conro, 2 Vt. 492 . . . . .	153, 154
v. Cooper, 1 Hill, 44 . . . . .	233
v. Edgell, 17 Vt. 9 . . . . .	178

Howard <i>v.</i> Pollock, 1 Yeates, 509 . . . . .	162
<i>v.</i> Sexton, 1 Denio, 440 . . . . .	111
<i>v.</i> Sexton, 4 Comst. 157 . . . . .	43, 47
Howett <i>v.</i> Clements, 1 C. B. 128 . . . . .	333, 335, 468, 536
Hoyt <i>v.</i> Hoyt, 8 Bosw. 511 . . . . .	209
Hubbell <i>v.</i> Bissell, 13 Gray, 298 . . . . .	58, 463, 563, 576
Huber <i>v.</i> Zimmerman, 21 Ala. 488 . . . . .	11
Hughes's Adm'r <i>v.</i> Peaslee, 50 Penn. St. 257 . . . . .	106
Humphreys <i>v.</i> Gardner, 11 Johns. 61 . . . . .	522
Humphrey <i>v.</i> Strong, 14 Mass. 262 . . . . .	45
Hunt <i>v.</i> Wilson, 6 N. H. 36 . . . . .	287
Hungate <i>v.</i> Mease, Cro. Eliz. 885 . . . . .	289
Hunter <i>v.</i> Bennison, Hardw. 43 . . . . .	105, 170, 392, 396
<i>v.</i> Rice, 15 East, 100 . . . . .	55, 510, 511
Huntig <i>v.</i> Ralling, 8 Dowl. 879 . . . . .	99, 100, 315
Huntley, <i>in re</i> , 1 El. & Bl. 787 . . . . .	334, 335
Hurst <i>v.</i> Bambridge, Rolle's Abr. Arb., Q. 7, p. 263 . . . . .	410
Hurst <i>v.</i> Litchfield, 39 N. Y. 377 . . . . .	89, 91, 93
Huston <i>v.</i> Mitchell, 14 Serg. & R. 307 . . . . .	16, 17
Hutchins <i>v.</i> Johnson, 12 Conn. 376 . . . . .	9, 24, 26
Hutchinson <i>v.</i> Shepperton, 13 Q. B. 955 . . . . .	323, 325

## I.

Imlay <i>v.</i> Wickoff, 1 South (N. J.), 132 . . . . .	132
Indiana Central R.R. Co. <i>v.</i> Bradley, 7 Ind. 49 . . . . .	65, 214, 226, 294
Ingram <i>v.</i> Bernard, 1 Ld. Raym. 636 . . . . .	598
<i>v.</i> Milnes, 8 East, 444 . . . . .	351, 467, 489
<i>v.</i> Webb, 1 Rolle's Rep. 362 . . . . .	278, 442
Inhabitants of Plymouth <i>v.</i> The Russell Mills, 7 Allen, 438 . . . . .	617
Inhabitants of N. Yarmouth <i>v.</i> Inhab. of Cumberland, 6 Greenl. 21 . . . . .	499, 595
Inman <i>v.</i> Wheeler, 1 Pick. 504 . . . . .	45
Innes <i>v.</i> Miller, 1 Dall. 188 . . . . .	126, 127
Inslee <i>v.</i> Flagg, 2 Dutcher, 368 . . . . .	111
Irvine <i>v.</i> Elnon, 8 East, 54 . . . . .	229
<i>v.</i> Marshall, 7 Minn. 286 . . . . .	65
Isaacs <i>v.</i> Beth Hamedash Society, 1 Hilt. 469 . . . . .	14
Ives <i>v.</i> Metcalfe, 1 Atk. 63 . . . . .	295

## J.

Jackson <i>ex dem.</i> Nellis <i>v.</i> Dysling, 2 Carnes, 198 . . . . .	517
<i>v.</i> Ambler, 14 Johns, 96 . . . . .	294, 315, 367, 408, 429, 431, 437, 446, 459, 466
<i>v.</i> De Long, 9 Johns. 43 . . . . .	432, 513

Jackson v. Clarke, McLel. & Y. 200 . . . . .	469
v. Gager, 5 Cow. 383 . . . . .	56, 164, 511, 515, 517
v. Ives, 22 Wend. 637 . . . . .	149, 151
James v. Thurston, 1 Cliff. C. C. 367 . . . . .	341, 437, 617
Jebb v. McKiernan, Moody & M. 340 . . . . .	42
Jeffrey v. Guy, Yelv. 78 . . . . .	590
Jenkins, <i>in re</i> , 1 Dowl. n. s. 276 . . . . .	171, 247
v. Betham, 24 L. J. C. P. 94 . . . . .	40
v. Gillespie, 10 Sm. & M. 31 . . . . .	15
Jenkinson v. Allisson, 1 Freem. 415 . . . . .	585
Jennings v. Vandeputt, Cro. Car. 263 . . . . .	244
Jesse v. Cater, 28 Ala. 475 . . . . .	60
Jewell v. Blankenship, 10 Yerg. 439 . . . . .	74
Johns v. Stevens, 3 Vt. 308 . . . . .	306, 307, 613
Johnson v. Durant, 2 Barn. & Ad. 925 . . . . .	314, 489, 569, 584
v. Hodgson, 8 East, 38 . . . . .	512
v. Latham, 19 L. J. Q. B. 329 . . . . .	199
v. Latham, 20 L. J. Q. B. 236 . . . . .	335, 394
v. McIntosh, 31 Barb. 267 . . . . .	209
v. Noble, 13 N. H. 286 . . . . .	214, 217, 294, 296, 297, 300, 305, 307
v. Parmely, 17 Johns. 129 . . . . .	68
v. Wilson, Willes, 248 . . . . .	55, 193, 385, 511, 579
Johnston v. Cheape, 5 Dow Parl. 247 . . . . .	104, 142, 143, 144, 172, 466
Jones v. Bailey, 5 Cal. 345 . . . . .	8, 9
v. Bennett, 1 Bro. P. C. 528 . . . . .	494, 620
v. Boston Mill Corporation, 4 Pick. 507, 6 Pick. 148, . . . . .	55, 195, 292, 294, 295, 373, 382, 603, 604, 606
v. Carter, 8 Allen, 431 . . . . .	627, 629
v. Dewey, 17 N. H. 596 . . . . .	256, 257, 258, 286, 516
v. Deyer, 16 Ala. 21 . . . . .	19
v. Hacker, 5 Mass. 264 . . . . .	47
v. Phoenix Bank, 4 Seld. 228 . . . . .	531
v. Powell, 6 Dowl. 483 . . . . .	381, 449
Jordan v. Hyatt, 3 Barb. 275 . . . . .	74, 118
Joseph v. Webster, <i>in re</i> , 1 Russ. & M. 496 . . . . .	21
Joy v. Simpson, 2 N. H. 179 . . . . .	441, 447, 461, 627, 628
Joyce v. Haines, Hard. 399 . . . . .	31, 279, 456
Jupp v. Grayson, 3 Dowl. 199 . . . . .	315
Juxon v. Thornhill, Cro. Car. 132 . . . . .	588

## K.

Kampshire v. Young, 2 Atk. 154 . . . . .	611
Kanouse v. Kanouse, 36 Ill. 439 . . . . .	438
Karthaus v. Ferrer, 1 Pet. 222 . . . . .	8, 9, 351, 356, 357, 362, 379, 423

Keans v. Rankin, 2 Bibb, 88 . . . . .	248
Keeler v. Harding, 23 Ark. 697 . . . . .	491, 591
Keen v. Batshore, 1 Esp. 194 . . . . .	106, 488, 579
Keene v. Atkinson, <i>in re</i> , Exch. Ap. 16, 1847 . . . . .	222, 354, 569
Keith v. Gore, 1 J. J. Marsh, 18 . . . . .	32
Kelly v. Crawford, 5 Wall. (U. S.) 785 . . . . .	37
Kemp v. Rose, 1 Giff. 258 . . . . .	101
Kemshead, <i>Ex parte</i> , 1 Rose, 149 . . . . .	30
Kendall v. Bates, 35 Maine, 357 . . . . .	19, 45
Kendrick v. Davies, 5 Dowl. 693 . . . . .	462, 625, 626
v. Tarbell, 26 Vt. 416 . . . . .	266, 371, 390, 420, 446
Kent v. Elstob, 3 East, 18 . . . . .	305, 310, 313, 325
Kenyon v. Grayson, 2 Smith, 61 . . . . .	553
Kerr v. Jeston, 1 Dowl. n. s. 538 . . . . .	225
Kesler v. Kerns, 5 Jones, Law, 191 . . . . .	86
Keson v. Barclay, 2 Penn. 531 . . . . .	36
Kill v. Hollister, 1 Wils. 129 . . . . .	89
Kimmel v. Shank, 1 Serg. & R. 24 . . . . .	47
Kind v. Carter, 1 Sid. 290 . . . . .	590
King v. Bowen, 8 Mee. & W. 625 . . . . .	594
v. Cook, Charl. 286 . . . . .	241
v. Jemison, 33 Ala. 499 . . . . .	47, 61
v. Savory, 8 Cush. 312 . . . . .	502, 504, 505
Kinge v. Fines, Sid. 59 Vin. Abr. Arb. H. 18 . . . . .	401
Kingsley v. Bill, 9 Mass. 197 . . . . .	576
v. Young, 17 Ves. Jr. 468 . . . . .	512
Kingston v. Kincaid, 1 Peake, N. P. 299 . . . . .	488, 600
v. Phelps, 1 Wash. C. C. 448 . . . . .	154, 158, 409, 420, 435, 562, 569
Kingwell v. Elliott, 7 Dowl. 423 . . . . .	121, 129, 172, 572
Kirk v. Unwin, 6 Exch. 908 . . . . .	204
Kleine v. Catara, 2 Gall. 61 . . . . .	214, 217, 218, 294, 300, 307, 315, 317, 329, 333, 336, 350
Knight v. Burton, 6 Mod. 231 . . . . .	55, 268, 269
v. Stone, W. Jones, 164 . . . . .	26
Knott v. Long, 2 Strange, 1025 . . . . .	389
Knowlton v. Homer, 30 Maine, 552 . . . . .	162, 246, 247, 285
v. Mickles, 29 Barb. 465 . . . . .	116, 119, 125
Knox v. Simmonds, 1 Ves. Jr. 369 . . . . .	215, 218, 219, 225, 323
Kockill v. Witherell, 2 Keb. 838 . . . . .	185, 404
Kunkle v. Kunkle, 1 Dall. 364 . . . . .	154, 158
Kyle, <i>in re</i> , 2 Jur. 760 . . . . .	123
v. Kavanagh, 103 Mass. 356 . . . . .	195
Kynaston v. Jones, Styles, 97 . . . . .	278

## L.

Ladd v. Lord, 36 Vt. 194 . . . . .	613
Lady Wenman v. Mackenzie, 5 El. & Bl. 447 . . . . .	519
Laing v. Todd, 13 C. B. 276 . . . . .	203
Lamar v. Nicholson, 7 Porter, 158 . . . . .	43
Lambard v. Kingsford, Lutw. 558 . . . . .	589
Lamphire v. Cowan, 39 Vt. 420 . . . . .	179, 189, 191, 254, 265, 266, 267, 352 362, 383, 387, 414, 420, 433, 446, 485, 558, 576, 577
Lancaster v. Hemington, 4 Ad. & El. 345 . . . . .	312, 316
Langley v. Hickman, 1 Sandf. 681 . . . . .	148
Lanman v. Young, 31 Penn. St. 306 . . . . .	42
Lansdale v. Kendall, 4 Dana, 613 . . . . .	226, 289
Large v. Passmore, 5 Serg. & R. 51 . . . . .	47, 80, 87, 131, 133
Larkin v. Robbins, 2 Wend. 505 . . . . .	73, 75
Lathrop v. Hitchcock, 38 Vt. 496 . . . . .	238
Latimer v. Ridge, 1 Binn. 458 . . . . .	135, 151
Lattier v. Rachal, 12 La. An. 695 . . . . .	20, 172
Lattimore v. Martin, Addis. 11 . . . . .	84
Latuche v. Pasherante, 1 Salk. 86 . . . . .	17
Laurence v. Hodgson, 1 Younge & Jer. 16 . . . . .	427
Lazell v. Houghton, 32 Vt. 579 . . . . .	84, 85
Leake v. Butler, Litt. 312 . . . . .	587
Lean v. Schutz, Wm. Bl. 1197 . . . . .	28
Learned v. Bellows, 8 Vt. 79 . . . . .	139, 307
Leavitt v. Comer, 5 Cush. 129 . . . . .	358, 363, 365, 568, 570
Lee v. Elkins, 12 Mod. 585 . . . . .	193, 204, 205, 399, 405, 456, 465, 483, 560, 589
v. Hemmingway, 3 Nev. & M. 860 } . . . . .	40
v. Hemmingway, 3 L. J. K. B. 124 } . . . . .	
v. Lingard, 1 East, 400 . . . . .	215, 584
v. Tillotson, 24 Wend. 337 . . . . .	71
Leeds v. Burrows, 12 East, 1 n. . . . .	40, 42
Leggo v. Young, 16 Q. B. 626 . . . . .	563
Leominster v. Worcester R.R. Co., 7 Allen, 38 . . . . .	100, 276, 463, 482
Leonard v. House, 15 Geo. 473 . . . . .	40, 73, 230
Libtral v. Field, 1 Keb. 885 . . . . .	31
Ligon v. Ford, 5 Munf.'10 . . . . .	71, 143
Lile v. Barnett, 2 Bibb, 167 . . . . .	112
Linch v. Clemence, Lutw. 571 . . . . .	204
Lincoln v. Whittendon Mills, 12 Metc. 31 . . . . .	388, 398
Lindsay v. Lindsay, 11 Irish C. L. Rep. 311 . . . . .	388
Lindsey v. Aston, 2 Bulst. 38 . . . . .	456
Linfield v. Ferne, 3 Lev. 18 . . . . .	417
Lingood v. Croucher, 2 Atk. 395 . . . . .	544
v. Eade, 2 Atk. 501 . . . . .	166, 189, 190, 191, 192, 389, 397, 576, 618

Lingood, <i>ex parte</i> , 1 Atk. 240 . . . . .	529
Linnen <i>v.</i> Williamson, Rolle's Abr. Arb. K. 16 . . . . .	553
Linsey <i>v.</i> Ashton, Godbold, 255 . . . . .	594
Little <i>v.</i> Newton, 9 Dowl. 437 . . . . .	152, 153, 157, 167
<i>v.</i> Silverthorne, 2 Penning. 680 . . . . .	111, 112
Livermore <i>v.</i> Jamaica, 23 Vt. 363 . . . . .	196
Livingston <i>v.</i> Ralli, 24 L. J. Q. B. 269 } . . . . .	91
<i>v.</i> Ralli, 5 E. & B. 132 } . . . . .	
Lock <i>v.</i> Vulliamy, 2 N. & M. 336 . . . . .	252
Lockhart <i>v.</i> Kidd, 2 Rep. Const. Ct. 217 . . . . .	164
Lockwood <i>v.</i> Smith, 10 W. R. 628 . . . . .	570
Logsdon <i>v.</i> Roberts' Ex'ors, 3 Monr. 255 . . . . .	19, 43, 51, 52
Londonderry & Enniskillen Railway Co. <i>v.</i> Leishman, 12 Beav. 423 . . . . .	620
Lord <i>v.</i> Hawkins, 2 Hurl. & Nor. 55 . . . . .	268
<i>v.</i> Lord, 5 El. & Bl. 404 . . . . .	152
Lord Lonsdale <i>v.</i> Littledale, 2 Ves. Jr. 451 . . . . .	620
Lord Montgomery <i>v.</i> Buckley, Joddrell's MSS., 1 Coop. C. C. 418 . . . . .	615
Loring <i>v.</i> Alden, 3 Metc. (Mass.) 576 . . . . .	63, 82
<i>v.</i> Whittemore, 13 Gray, 228 . . . . .	194, 518, 555, 591, 601
Love <i>v.</i> Honeybourne, 4 Dowl. & Ry. 814 . . . . .	21, 434
Lowenstein <i>v.</i> McIntosh, 37 Barb. 251 . . . . .	11, 13
Lower <i>v.</i> Lower, Rolle's Abr. Arb. E. 20, & H. 11 . . . . .	393
Lowes <i>v.</i> Kermod, 8 Taunt. 146. . . . .	592
Lumley <i>v.</i> Hutton, Cro. Jac. 447 . . . . .	553
Lupart <i>v.</i> Welson, 11 Mod. 171 . . . . .	578, 586
Lutz <i>v.</i> Linthicum, 8 Peters, 178 . . . . .	118, 119, 125
Lyle <i>v.</i> Clason, 1 Caines, 323 . . . . .	322
<i>v.</i> Rodgers, 5 Wheat. 394 . . . . .	358, 427, 430, 458, 467
Lyman <i>v.</i> Arms, 5 Pick. 213 . . . . .	210, 211, 213
Lyon <i>v.</i> Blossom, 4 Duer, 318 . . . . .	241

## M.

MacArthur <i>v.</i> Campbell, 5 B. & Ad. 518 . . . . .	288, 289
<i>v.</i> Campbell, 2 Ad. & El. 52 . . . . .	543
Mackay, <i>in re</i> , 2 Ad. & El. 356 . . . . .	191, 211
<i>v.</i> Bloodgood, 9 Johns. 285 . . . . .	8
Mackey <i>v.</i> Neill, 8 Jones, Law, 214 . . . . .	162
Mackintosh <i>v.</i> Blyth, 1 Bing. 269 . . . . .	624
Macquen <i>v.</i> Nottingham Caledonian Society, 9 C. B. n. s. 793 . . . . .	136
Madison Ins. Co. <i>v.</i> Griffin, 3 Ind. 277 . . . . .	6, 151, 172, 238
Maloney <i>v.</i> Stockley, 2 Dowl. n. s. 122 . . . . .	351
<i>v.</i> Stockley, 4 Man. & Gr. 647 . . . . .	205, 450
Manley <i>v.</i> Bray, 11 Jur. 521 . . . . .	543
Manlove <i>v.</i> Thrift, 5 Munf. 492 . . . . .	84

Mansell v. Burredge, 7 Term, 352 . . . . .	579, 584
Manser v. Heaver, 2 Barn. & Ad. 295 . . . . .	389, 392, 473
Maples v. Avery, 6 Conn. 20 . . . . .	587
March v. Eastern Railroad, 40 N. H. 548 . . . . .	89, 91
Marco v. Liverpool & London F. & L. Ins. Co., 35 N. Y. 664 . . . . .	617
Marder v. Cox, Cowp. 127 . . . . .	463
Markham v. Jennings, Rolle's Abr. Arb. 254, 263 . . . . .	425
Marks v. Marriot, 1 Ld. Raym. 114 . . . . .	192, 279, 511, 554, 585
Marks v. Marryott, 1 Lutw. 524 . . . . .	284
Marsack v. Webber, 6 Hurl. & Nor. 498 . . . . .	577
Marseilles v. Kenton's Ex'ors, 17 Penn. St. 238 . . . . .	230, 233, 235
Marsh, in re, 16 L. J. Q. B. 330 . . . . .	135, 295
v. Bulteel, 5 Barn. & Ald. 507 . . . . .	230, 583, 598
v. Hutchinson, 2 Bos. & P. 226 . . . . .	28
v. Packer, 20 Vt. 198 . . . . .	256
v. Wood, 9 Barn. & Cr. 659 . . . . .	30, 527
Marshall v. Dresser, in re, 3 Q. B. 878 . . . . .	414, 421, 459, 612
v. Piles, 3 Bush (Ky.), 249 . . . . .	532
v. Powell, 9 Q. B. 779 . . . . .	224, 225
Martin v. Burge, 4 Ad. & El. 973 . . . . .	612
v. Chapman, 1 Ala. 278 . . . . .	51
v. Thornton, 4 Esp. 180 . . . . .	572
v. Thrasher, 40 Vt. 460 . . . . .	8
v. Williams, 13 Johns. 264 . . . . .	204, 459
Massey v. Thomas, 6 Binn. 333 . . . . .	47, 65, 432
Massy v. Aubrey, Sty. 365 . . . . .	410
Mason v. Bridge, 14 Maine, 468 . . . . .	39
v. The Stokes Bay Railway Co., 32 L. J. Chy. 110 . . . . .	605
Masters v. Gardener, 5 Jones, Law, 298 . . . . .	60
Matson v. Trower, 1 Ryl. & M. 17 . . . . .	128, 252
Matthews v. Matthews, 2 Curtis C. C. 105 . . . . .	557
Matthew v. Davis, 1 Dowl. N. S. 679 . . . . .	54
v. Ollerton, 4 Mod. 226; Comb. 218 . . . . .	105
Maule v. Maule, 4 Dow, 363 . . . . .	490
Maxfield v. Scott, 17 Vt. 634 . . . . .	70, 71, 77, 207
May v. Haven, 9 Mass. 325 . . . . .	160, 335
Maynard v. Frederick, 7 Cush. 247, . . . . .	131, 133, 135, 141, 153,
154, 155, 161, 162, 163, 172, 197, 463, 627	
Mayo v. Gardner, 4 Jones, Law, 359 . . . . .	36
Mayor of Ludlow v. Charlton, Ex. E. T. 1845; Russell on Arb. 3d ed.	
21, 26 . . . . .	19
Mayor, &c., of New York v. Butler, 1 Barb. 325 . . . . .	124, 125, 464, 478, 491
Mays v. Cannell, 24 L. J. C. P. 41 . . . . .	199, 202
McAdam's Ex'ors v. Stillwell, 1 Harris, 90 . . . . .	44, 47, 50, 80
M'Allister v. M'Allister, 1 Wash. 193 . . . . .	141
McAvoy v. Long, 13 Ill. 147 . . . . .	38

McBride v. Hagan, 1 Wend. 326 . . . . .	8, 9, 54, 459, 471
McCahan v. Reamey, 33 Penn. St. 535 . . . . .	87
McCall v. Crousillat, 6 Serg. & R. 167 . . . . .	77
M'Can v. O'Ferrall, 8 Cl. & Fin. 30 . . . . .	235
McClendon v. Kemp, 18 La. An. 162 . . . . .	46, 50
McClure v. Gulick, 2 Harrison, 340 . . . . .	80
McComb v. Turner, 14 Sm. & M. 119 . . . . .	25, 29
McCracken v. Clarke, 31 Penn. St. 498 . . . . .	54, 87
McCrary v. Harrison, 36 Ala. 579 . . . . .	159
McGheeheh v. Duffield, 5 Penn. St. 497 . . . . .	232, 335
McInroy v. Benedict, 11 Johns. 402 . . . . .	153, 154
McKeen v. Oliphant, 3 Harrison, 442 . . . . .	121
McKinney v. Page, 32 Maine, 513 . . . . .	39, 118, 125
McKinstry v. Solomons, 2 Johns. 57 . . . . .	243, 362, 394, 395, 398
McKnight v. Dunlop, 1 Seld. 537 . . . . .	146
v. McCullough, 21 Iowa, 111 . . . . .	81
M'Manus v. McCulloch, 6 Watts, 357 . . . . .	52, 256, 579
McMullen v. Mayo, 8 Sm. & Mar. 298 . . . . .	50, 55
McNear v. Bailey, 18 Maine, 251 . . . . .	55, 63, 344, 345, 361, 362, 455, 603
McNeil v. Magee, 5 Mason, 244 . . . . .	193, 195, 445, 603, 604, 605, 607
McRae v. McLean, 2 El. & Bl. 946 . . . . .	333, 334, 335, 336
v. Robeson, 2 Murph. 127 . . . . .	141
McShane v. Gray, 13 Iowa, 504 . . . . .	175
Mechanics' Bank v. Fisher, 1 Rawle, 341 . . . . .	78
Meloy v. Dougherty, 16 Wisc. 269 . . . . .	620
Merchants' Bank v. Rawls, 21 Ga. 334 . . . . .	19
Meredith v. Alleyn, 1 Salk. 138 . . . . .	589
Merrill v. Gold, 1 Cush. 457 . . . . .	70, 207, 212
Merritt v. Merritt, 11 Ill. 565 . . . . .	65
v. Thompson, 27 N. Y. 225 . . . . .	67
Metcalfe v. Ives, 1 Atk. 63 . . . . .	540, 613
Michie, <i>ex parte</i> , 1 Mont. D. & De Gex, 181; 9 L. J. Bank. 28 . . . . .	30
Mickles v. Thayer, 14 Allen, 114 . . . . .	301, 595, 620
Middleton v. Weeks, Cro. Jac. 200 . . . . .	356
Millar v. Criswell, 3 Barr, 449 . . . . .	16, 17, 18
Miller v. De Burgh, 4 Exch. 809 . . . . .	199, 401
v. Goodwin, 29 Ind. 46 . . . . .	43
v. Moore, 7 Serg. & R. 164 . . . . .	27, 382
v. Pres't of Junction Canal Co., 53 Barb. 590 . . . . .	91
v. Robe, 3 Taunt. 461 . . . . .	626
v. Van Anken, 1 Wend. 516 . . . . .	76
v. Vaughan, 1 Johns. 315 . . . . .	68
Mills v. Bowyer's Society, 3 Kay & J. 66 . . . . .	323, 333, 570
Milne v. Gratrix, 7 East, 607 . . . . .	230
Milnes v. Robertson, 24 L. J. C. P. 29 . . . . .	30
Mitchell v. Bush, 7 Cow. 185 . . . . .	56, 221, 294, 298



Mitchell v. Harris, 4 Bro. Ch. 311 . . . . .	89, 90
v. Harris, 2 Ves. Jr. 129 . . . . .	540, 613
v. Staveley, 16 East, 58 . . . . .	345, 361, 363, 593
v. Wilhelm, 6 Watts, 259 . . . . .	172
Mole v. Smith, 1 Jac. & W. 673 . . . . .	17, 18
Monongahela Navigation Co. v. Fenlon, 4 Watts & S. 205 . . . . .	92
Monosiet v. Post, 4 Mass. 532 . . . . .	44, 46
Montague v. Smith, 13 Mass. 396 . . . . .	173, 260
Moore v. Barnett, 17 Ind. 349 . . . . .	69, 170
v. Bedell, Rolle's Abr. Arb. B. 5, p. 247 . . . . .	204
v. Booth, 3 Ves. Jr. 350 . . . . .	134
v. Cockcroft, 4 Duer, 133 . . . . .	356, 561
v. Darley, 1 C. B. 445 . . . . .	288, 626
v. Ewing, Coxe (N. J.), 144 . . . . .	153, 170
Mooers v. Allen, 35 Maine, 276 . . . . .	73
Morewood v. Jewett, 2 Robertson, 496 . . . . .	118, 120
Morgan v. Birnie, 9 Bing. 672 . . . . .	104, 172
v. Bolt, 1 N. R. 271 . . . . .	152, 243
v. Man, 1 Lev. 127 . . . . .	592
v. Mather, 2 Ves. Jr. 15 . . . . .	186, 211, 215, 216, 316, 328, 536, 543, 613
v. Morgan, 1 Dowl. 611 . . . . .	101
v. Pindar, 3 Rep. in Chy. 76 . . . . .	619
v. Smith, 1 Dowl. N. s. 617 . . . . .	198, 481, 483, 624, 625
Morley v. Newman, 5 Dowl. & Ryl. 317 . . . . .	188
Morphett, <i>in re</i> , 2 D. & L. 967 . . . . .	83, 119, 156, 184, 186, 211
Morris v. Morris, <i>in re</i> , 6 El. & Bl. 383 . . . . .	335
v. Ross, 2 Hen. & Munf. 408 . . . . .	314, 321
Morrison v. Buchanan, 32 Vt. 288 . . . . .	628, 631
Mortin v. Burge, 4 Ad. & El. 973 . . . . .	410
Morton v. Cameron, 3 Robertson, 189 . . . . .	491
Moulson v. Rees, 6 Binn. 32 . . . . .	328
Muckey v. Pierce, 3 Wis. 307 . . . . .	74
Mudy v. Osam Litt. 30 . . . . .	32, 203
Mulder v. Cravat, 2 Bay (S. C.), 370 . . . . .	135
Muldrow v. Norris, 2 Cal. 74 . . . . .	87
Mullins v. Arnold, 4 Sneed, 262 . . . . .	233, 241, 242
Mundy v. Black, 9 C. B. N. s. 557 . . . . .	144
Munro v. Alaire, 2 Caines, 320 . . . . .	55, 59, 60, 65, 283, 284, 379, 465
Munson v. Munson, 3 Day, 260 . . . . .	532
Murray v. Bruner, 6 Serg. & R. 276 . . . . .	428, 431
v. Gregory, 5 Exch. 486 . . . . .	602
Musselbrook v. Dunkin, 9 Bing. 605 . . . . .	136, 289
Mussina v. Hertzog, 5 Binn. 387 . . . . .	87
Myers v. Dixon, 2 Hall (Sup. Ct. N. Y.), 456 . . . . .	85
v. York and Cumberland R.R. Co., 2 Curtis C. C. 28 . . . . .	179, 208, 210, 214, 294

## N.

Nagle v. Ingersoll, 7 Penn. St. 185 . . . . .	16
Neale v. Ledger, 16 East, 51 . . . . .	243
Nelson v. Andrews, 2 Mass. 164 . . . . .	628
Nettleton v. Gridley, 21 Conn. 531 . . . . .	73, 162
Newburyport Marine Ins. Co. v. Oliver, 8 Mass. 402 . . . . .	541
Newell v. Doty, 33 N. Y. 83 . . . . .	587
Newgate v. Degelder, 2 Keb. 10, 20, 24 . . . . .	230
Newland v. Douglass, 2 Johns. 62 . . . . .	332, 542
Newsome v. Bowyer, 3 P. Wms. 37 . . . . .	28
Newton v. West, 3 Metc. (Ky.), 241 . . . . .	70
Nichols v. Grunnon, Hob. 49 . . . . .	378
v. Rensselaer County M. Ins. Co., 22 Wend. 129 . . . . .	205, 453, 454, 455, 475, 479, 483, 558, 583, 589, 627
Nickalls v. Warren, 6 Q. B. 615 . . . . .	142, 536
Nickels v. Hancock, 7 De Gex, Macn. & Gor. 300 . . . . .	403, 454, 605, 606, 607
Nicholls v. Jones, 6 Exch. 373 . . . . .	198, 199
Noble v. Peebles, 13 Serg. & R. 319 . . . . .	53, 54, 59
North Yarmouth v. Cumberland, 6 Greenl. 21 . . . . .	578, 612
v. Savage, 10 Maine, 455 . . . . .	172, 174, 206
Norton v. Mascall, 2 Rep. in Chy. 304 . . . . .	606
Norwich v. Norwich, 3 Leon. 62 . . . . .	203, 204, 456
Nott v. Long, 9 Geo. II., B. R. cited in 1 Wils. 28 . . . . .	388

## O.

Oakes v. Moore, 24 Maine, 214 . . . . .	42
Oates v. Bromil, 1 Salk. 75 . . . . .	257
v. Bromil, 6 Mod. 176 . . . . .	257, 283, 284, 585
Offut v. Proctor, 4 Bibb, 252 . . . . .	537
Oglander v. Baston, 1 Vern. 396 . . . . .	511
Okison v. Flickinger, 1 Watts & S. 257 . . . . .	47
Olcott v. Wood, 14 N. Y. (4 Kern.) 32 . . . . .	55
Oldfield v. Wilmer, 1 Leon. 140, 304 . . . . .	405, 483, 560
Onion v. Robinson, 15 Vt. 510 . . . . .	379
Orcutt v. Butler, 42 Maine, 83 . . . . .	59, 66, 453, 460, 481, 484
O'Reilly v. Kerns, 52 Penn. St. 214 . . . . .	92
Ormelade v. Coke, Cro. Jac. 354 . . . . .	340, 378, 589
Orr v. Hadley, 36 N. H. 575 . . . . .	51, 516
Ott v. Schroepfel, 5 N. Y. 482 . . . . .	252, 262, 340, 341, 345, 349, 350, 351, 356, 361, 362, 365, 372, 495
Overly's Ex'ors v. Overly's Devisees, 1 Metc. (Ky.) 117 . . . . .	19, 43
Overton v. Alpha, 13 La. An. 558 . . . . .	111

Owdy v. Gibbons, Comb. 100 . . . . .	104, 172
Owen v. Boerum, 23 Barb. 187 . . . . .	60, 259, 279, 391
v. Hurd, 2 Term, 643 . . . . .	33
Oxenham v. Lemon, 2 Dowl. & Ry. 461 . . . . .	505

## P.

Packer v. French, Hill & Den. 103 . . . . .	150
Page v. Foster, 7 N. H. 392 . . . . .	55, 511, 603
v. Monks, 5 Gray, 492 . . . . .	70, 205, 207
v. Pendergast, 2 N. H. 233 . . . . .	271, 272, 599
Paine v. Ball, 3 Mass. 235 . . . . .	29
v. Paine, 15 Gray, 299 . . . . .	187, 386
Palmer v. Davis, 28 N. Y. 242 . . . . .	27, 28, 29, 56, 381
v. Green, 6 Conn. 14 . . . . .	63
Pancoast v. Curtis, 1 Halst. 415 . . . . .	287
Parker v. Burroughs, Colle's Parl. Ca. 257 . . . . .	100, 108
v. Crammer, 1 Penning. 271 . . . . .	111, 112
v. Parker, Cro. Eliz. 448 . . . . .	281
Parkes v. Smith, 15 Q. B. 297 . . . . .	93
Parkinson v. Smith, 30 L. J. Q. B. 178 . . . . .	626
Parmelee v. Allen, 32 Conn. 115 . . . . .	453, 454, 480
Parnell v. King, Rice (S. C.), 376 . . . . .	73
Parr v. Wintringham, 28 L. J. Q. B. 123 . . . . .	105
Parsons v. Aldrich, 6 N. H. 264 . . . . .	285, 362, 442, 446, 447, 589
v. Parsons, Cro. Eliz. 211 . . . . .	548
Patten v. Hunnewell, 8 Greenl. 19 . . . . .	147
Patterson v. Baird, 7 Ired. Eq. 255 . . . . .	562
v. Leavitt, 4 Conn. 50 . . . . .	162
Patton v. Baird, 7 Ired. Eq. 255 . . . . .	228, 266, 448
Pascoe v. Pascoe, 3 Bing. N. C. 898 . . . . .	197, 585
Passmore v. Pettit, 4 Dall. 271 . . . . .	123, 151, 247
Paull v. Paull, 2 Cr. & M. 235, 2 Dowl. 346 . . . . .	278, 543
Payne v. Bailey, 7 Moore, 147 . . . . .	323
v. Cook, cited in 1 Taunt. 548 . . . . .	340
v. Massey, 9 J. B. Moore, 666 . . . . .	214
Pearson v. Fiske, 2 Hilton, 146 . . . . .	145
v. Henry, 5 Term, 6 . . . . .	21, 488
v. Morrison, 2 Serg. & R. 20 . . . . .	16
Peck v. Wakeley, 2 McCord, 279 . . . . .	243
v. York, 47 Barb. 131 . . . . .	146, 147
Pedley v. Goddard, 7 Term, 73 . . . . .	389, 394, 416, 625
Pennell v. Walker, 26 L. J. C. P. 9 . . . . .	205
Penniman v. Rodman, 13 Metc. 382 . . . . .	55, 193, 194, 195, 603, 604
People v. McGinnis, 1 Parker Cr. Ca. 387 . . . . .	55, 67, 112

People v. Onondaga Common Pleas, 1 Wend. 314 . . . . .	74
v. Townsend, 5 How. Pr. 315 . . . . .	131
Pepper v. Gorham, 4 Moore, 148 . . . . .	145, 536
Percival v. Herbemont, 1 M'Mullan, 59 . . . . .	91
Pering v. Keymer, <i>in re</i> , 3 Ad. & El. 245 . . . . .	157
Perkins v. Giles, 53 Barb. 342 . . . . .	434, 541
v. Wing, 10 Johns. 143 . . . . .	264, 282, 284, 287
Perriman v. Steggall, 9 Bing. 679 . . . . .	136, 215, 315
Perry v. Berry, 3 Bulstr. 62 . . . . .	449
v. Mitchell, 2 Dowl. & Low. 452 . . . . .	413, 420
v. Moore, 2 E. D. Smith, 32 . . . . .	104, 105, 172
v. Nicholson, 1 Burr. 278 . . . . .	490, 587, 588
Peters' Adm'r v. Craig, 6 Dana, 307 . . . . .	230, 236
Peters v. Johnson, 3 Har. & J. 291 . . . . .	84
v. Newkirk, 6 Cow. 103 . . . . .	118, 125
v. Pierce, 8 Mass. 398 . . . . .	627
Peterson v. Ayre, 23 L. J. C. P. 129 . . . . .	145
v. Loring, 1 Greenl. 64 . . . . .	160
Petit v. Wingate, 25 Penn. St. 74 . . . . .	58
Phelps v. Goodman, 14 Mass. 252 . . . . .	330
Philbrick v. Preble, 18 Maine, 255 . . . . .	50, 256, 257, 458, 517
Phillips v. Evans, 12 Mee. & W. 309 . . . . .	325, 568
v. Knightly, Fitzg. 272 . . . . .	204, 554, 589
Phippen v. Stickney, 3 Metc. 384 . . . . .	156, 163
Phipps v. Ingram, 3 Dowl. 669 . . . . .	534, 536
Pickering v. Pickering, 19 N. H. 389 . . . . .	555, 587.
v. Watson, 2 W. Bl. 1118 . . . . .	193, 465
Pierce v. Pierce, 30 Maine, 113 . . . . .	45
Pike v. Gage, 9 Foster, 461 . . . . .	135
Pilmore v. Hood, 8 Dowl. 21 . . . . .	617
Pinhorn v. Tuckington, 3 Camp. 468 . . . . .	584
Pinkny v. Bullock, 3 Lev. 413 . . . . .	417, 481, 483
Pitcher v. Rigby, 9 Price, 79 . . . . .	215, 489, 620
Pits v. Wardal, Godb. 164 . . . . .	204, 590
Platt v. Smith, 14 Johns. 368 . . . . .	331, 375
Pleasants v. Ross, 1 Wash. 156 . . . . .	69, 322, 336
Plews v. Middleton, 6 Q. B. 845 . . . . .	126, 152
Plummer v. Lee, 2 Mee. & W. 495 . . . . .	413
v. Morrill, 48 Maine, 184 . . . . .	285, 589
Pollock v. Hall, 4 Dall. 222 . . . . .	77
Pomroy v. Gold, 2 Metc. 500 . . . . .	552, 557
Poole v. Pipe, 3 Rep. in Chy. 11, 20 . . . . .	606
Pope v. Bish, 1 Anst. 59 . . . . .	610
v. Brett, 2 Saund. 292 . . . . .	203, 410, 454, 456, 457, 481
Porter v. Buckfield Branch R.R., 32 Maine, 539 . . . . .	221, 627
v. Dickerman, 11 Gray, 482 . . . . .	71

Portland, Inhab's of <i>v. Brown</i> , 43 Maine, 223 . . . . .	193, 446
Potter <i>v. Day</i> , Pract. Reg. C. B. 47 . . . . .	525
<i>v. Newman</i> , 4 Dowl. 504 . . . . .	323
<i>v. Sterrett</i> , 24 Penn. St. 411 . . . . .	206, 235
Power <i>v. Power</i> , 7 Watts, 205 . . . . .	230, 233, 234, 240
Pratt <i>v. Hackett</i> , 6 Johns. 14 . . . . .	259, 262, 280, 282, 283
<i>v. Hillman</i> , 4 Barn. & Cr. 269 . . . . .	310, 313
<i>v. Salt</i> , Ca. temp. Hardw. 161 . . . . .	625
Prentice <i>v. Reed</i> , 1 Taunt. 151 . . . . .	199
President, &c. <i>v. Van Reenan</i> , 1 Knapp, Pr. C. Rep. 83 . . . . .	233
Preston <i>v. Whitcomb</i> , 11 Vt. 47 . . . . .	195, 547, 549, 556
Price <i>v. Hollis</i> , 1 M. & S. 105 . . . . .	54, 252, 315
<i>v. Kirby</i> , 1 Ala. 184 . . . . .	46
<i>v. Popkin</i> , 10 Ad. & El. 139 . . . . .	184, 199, 211, 277, 612
<i>v. White</i> , 27 Mis. (6 Jones) 275 . . . . .	61
<i>v. Williams</i> , 1 Ves. Jr. 365 . . . . .	571
Primer <i>v. Kuhn</i> , 1 Dall. 452 . . . . .	57
Proctor <i>v. Williamson</i> , 29 L. J. C. P. 157, and 8 C. B. N. s. 386 . . . . .	131, 166
Proprietors Fryeburg Canal <i>v. Frye</i> , 5 Greenl. 38 . . . . .	6, 13
Prosser <i>v. Goringe</i> , 3 Taunt. 425 . . . . .	199
Proudfoot <i>v. Poile</i> , 3 Dowl. & Low. 524 . . . . .	204
Pulliam <i>v. Pensoneau</i> , 33 Ill. 375 . . . . .	322, 570
Purdy <i>v. Delavan</i> , 1 Caines, 320 . . . . .	267, 379, 408, 415, 433, 437
Purslow <i>v. Bailey</i> , 2 Ld. Raym. 1039 . . . . .	180, 578, 580, 591
Pusey <i>v. Desbouvrie</i> , 3 P. Wms. 315 . . . . .	507, 609

## Q.

Quimby <i>v. Melvin</i> , 28 N. H. 250 . . . . .	96, 162
<i>v. Melvin</i> , 35 id. 198 . . . . .	96

## R.

Raguet <i>v. Carmouche</i> , 5 La. An. 133 . . . . .	46, 50
Rainforth <i>v. Hamer</i> , 25 L. T. 247 . . . . .	427
Rand <i>v. Reddington</i> , 13 N. H. 72 . . . . .	539
Randal <i>v. Gurney</i> , 3 Barn. & Ad. 252 . . . . .	134
Randall <i>v. Randall</i> , 7 East, 81 . . . . .	340, 350, 360, 363
Randel <i>v. Chesapeake &amp; Delaware Canal Co.</i> , 1 Harringt. 233 . . . . .	91
Ranney <i>v. Edwards</i> , 17 Conn. 309 . . . . .	246, 247
Rauck <i>v. Becker</i> , 12 Serg. & R. 412 . . . . .	87
Ravee <i>v. Farmer</i> , 4 Tenn. 146 . . . . .	493, 505, 572, 599
Rawling <i>v. Wood</i> , Barnes, 54 . . . . .	256

Reed v. Stockwell, 34 Vt. 206 . . . . .	71
Rees v. Waters, 16 Mee. & W. 263 . . . . .	185, 353, 356, 463, 612
Reeves v. Goff, 1 Penning. 143 . . . . .	111, 112, 162
Regent's Canal Co. v. Ware, 26 L. J. Chy. 566 . . . . .	605
Relyea v. Ramsay, 2 Wend. 602 . . . . .	211, 233, 236
Remington v. Morris, 2 Grant, 457 . . . . .	72
Renouil v. Harris, 2 Sandf. 641 . . . . .	70
Rex v. Bingham, 2 Tyrw. 46 . . . . .	528
v. Cotton, 3 Camp. 444 . . . . .	519
v. Davis, 9 East, 317 . . . . .	528
v. Fontainemoreau, 11 Q. B. 1028 . . . . .	525
v. Hallett, 20 L. J. M. C. 197 . . . . .	133
v. Hanks, 3 Car. & Payne, 419 . . . . .	132
v. Hill, 7 Price, 636 . . . . .	19
v. Newman, 1 Wils. 7 . . . . .	132
v. Whitaker, 9 Barn. & C. 648 . . . . .	162
Reynolds v. Askew, 5 Dowl. 682 . . . . .	615
v. Caldwell, 51 Penn. St. 298 . . . . .	92
v. Roebuck, 37 Ala. 408 . . . . .	175
Rhodes v. Baird, 16 Ohio St. 573 . . . . .	162
Rice v. Benedict, 18 Mich. 75 . . . . .	338
v. Clarke, 8 Vt. 104 . . . . .	85
Richards v. Brockenbrough's Adm'r, 1 Rand. 449 . . . . .	244
v. Drinker, 1 Halst. 307 . . . . .	340, 345, 353
Richardson v. Huggins, 23 N. H. 106 . . . . .	178, 179, 180, 189, 212, 443, 480
v. Nourse, 2 Barn. & Ald. 237 . . . . .	314
v. Worsley, 5 Exch. 613 . . . . .	624
Richter v. Chamberlin, 6 Binney, 34 . . . . .	466
Rickard v. Patterson, 5 Harrington, 235 . . . . .	150
Ricketts v. Gurney, 7 Price, 699 . . . . .	134
Riddell v. Sutton, 5 Bing. 200 . . . . .	21, 543, 582
Rider v. Fisher, 5 Scott, 86 . . . . .	424
v. Fisher, <i>in re</i> , 3 Bing. N. C. 874 . . . . .	360, 367
Ridgen v. Martin, 6 Har. & J. 403 . . . . .	118, 125, 241, 243
Ridout v. Pain, 3 Atk. 486 . . . . .	314
v. Pye, 1 Bos. & P. 91 . . . . .	132, 133
Rigden v. Martin, 6 Har. & J. 403 . . . . .	118, 124, 125
Ringer v. Joyce, 1 Marsh. 404 . . . . .	146, 150
Risden v. Inglet, Cro. Eliz. 838 . . . . .	340
Rison v. Berry, 4 Rand. 275 . . . . .	241, 246
Rivers v. Walker, 1 Dall. 81 . . . . .	119
Rixford v. Nye, 20 Vt. 132 . . . . .	61, 254, 267, 276, 286, 352, 414, 437, 440, 446, 463, 630
Robbins v. Standard, Sid. 327 . . . . .	598
Roberts v. Eberhardt, 27 L. J. C. P. 70 . . . . .	592, 594
v. Marriett, 2 Saund. 190 . . . . .	192

Roberts v. Marriot, 2 Saund. 183 . . . . .	592
v. Newbold, Comb. 318 . . . . .	25
Robertson v. McNeil, 12 Wend. 578 . . . . .	231, 444, 445, 446, 514, 565
Robison v. Calwood, 6 Mod. 82 . . . . .	279, 585
Robson & Railston, <i>in re</i> , 1 Barn. & Ad. 723 . . . . .	344, 493
Robinson v. Hawkins, 38 Vt. 693 . . . . .	79
v. Henderson, 6 M. & S. 276 . . . . .	626
v. Moore, 17 N. H. 479 . . . . .	181, 194
v. Morse, 26 Vt. 392 . . . . .	494, 497, 506
v. Morse, 29 Vt. 404 . . . . .	66
Robson v. ———, 2 Rose, 50 . . . . .	20, 30
Rochester v. Whitehouse, 15 N. H. 486 . . . . .	42
Rock v. Slade, 7 Dowl. 22 . . . . .	26
Rodham v. Stroher, 3 Keb. 830 . . . . .	589
Roe d. Wood v. Doe, 2 Term, 644 . . . . .	244, 623
Rogers v. Dallimore, 6 Taunt. 111 . . . . .	323
v. Kenwick, Quincy, 63, 64 . . . . .	515
v. Playford, 12 Penn. St. 181 . . . . .	87
v. Tatum, 1 Dutcher, 281 . . . . .	225
Rogers' Heirs v. Hall, 6 Humph. 29 . . . . .	74
Roloson v. Carson, 8 Md. 208 . . . . .	118
Roosevelt v. Thurman, 1 Johns. Chy. 220, 226 . . . . .	297
Roper v. Levi, 21 L. J. Exch. 28 . . . . .	585, 595
Rose v. Redfern, 10 W. R. 91 . . . . .	626
Ross v. Boards, 8 Ad. & El. 290 . . . . .	184, 211, 352
v. Clifton, 9 Dowl. 356 . . . . .	54, 199
v. Watt, 16 Ill. 99 . . . . .	59
Rosse v. Hodges, 1 Ld. Raym. 233 . . . . .	432, 552
Round v. Hatton, 10 Mee. & W. 660 . . . . .	196
Rous v. Lun, 1 Keb. 569 . . . . .	203, 394
Routh v. Peach, 3 Anst. 637 . . . . .	191, 620
Routledge v. Carruthers, 4 Dow, 392 . . . . .	490
Rowe v. Sawyer, 7 Dowl. 691 . . . . .	544
v. Williams, 97 Mass. 163 . . . . .	91, 93
v. Wood, 1 Jac. & Walk. 315 . . . . .	508
v. Young, 2 Ball & Beatty, 165, per Bailey, J., 233 . . . . .	589
Rowley v. Young, 3 Day, 118 . . . . .	239
Rowsby v. Manning, 3 Mod. 331 . . . . .	284, 585
Royston v. Rydall, Rolfe's Abr. Arb. H. 8, p. 250 . . . . .	185, 404
Rudder v. Price, 1 H. Bl. 547 . . . . .	579
Rudston v. Yeates, March. 111, 141 . . . . .	4
v. Yeates, 1 Rolfe's Abr. Arb. A. 268 . . . . .	4
Rule v. Bryde, 1 Exch. 151 . . . . .	349
Rumsey v. Leek, 5 Wend. 20 . . . . .	27, 29
Rundell v. La Fleur, 6 Allen, 480 . . . . .	214, 279, 287, 294, 296, 299, 596
Russell, <i>ex parte</i> , 1 Rose, 278 . . . . .	134

Russell <i>v.</i> Gray, 6 Serg. & R. 145 . . . . .	84, 172, 206
<i>v.</i> Headington, 1 Stark. 13 . . . . .	553
<i>v.</i> Lane, 1 Barb. 519 . . . . .	19
<i>v.</i> Pelegrini, 6 E. & B. 1020 . . . . .	93
Ruston <i>v.</i> Dunwoody, 1 Binn. 42 . . . . .	234
Rutter, <i>ex parte</i> , 3 Hill, 464 . . . . .	147, 148, 149
Ryan <i>v.</i> Dougherty, 30 Cal. 218 . . . . .	74
Rybott <i>v.</i> Barrell, 2 Eden C. C. 131 . . . . .	544, 621

S.

Saccum <i>v.</i> Norton, 2 Keb. 865 . . . . .	235
Sackett <i>v.</i> Owen, 2 Chitty's Rep. 39 . . . . .	602
Saffle <i>v.</i> Cox, 9 Humph. 142 . . . . .	74
Salkeld <i>v.</i> Slater, 12 Ad. & E. 767 . . . . .	171, 247
Sallowes <i>v.</i> Girling, Cro. Jac. 278 . . . . .	261
<i>v.</i> Girling, Yelv. 203 . . . . .	159, 347
Salmon <i>v.</i> Watson, 4 Moore, 73 . . . . .	488
Samon's Case, 5 Rep. 77 b. . . . .	433
Samon <i>v.</i> Pit, Rolle's Abr. Arb. B. 7, p. 243 . . . . .	203
Samuel <i>v.</i> Cooper, 2 Ad. & El. 752 . . . . .	138, 143, 346, 612
Santee <i>v.</i> Kleister, 6 Binn. 36 . . . . .	374
Sargeant <i>v.</i> Butts, 21 Vt. 99 . . . . .	538
Savage <i>v.</i> Gulliver, 4 Mass. 171 . . . . .	213
Sawyer <i>v.</i> Fellows, 6 N. H. 107 . . . . .	51, 258, 516
<i>v.</i> Freeman, 35 Maine, 542 . . . . .	182, 459, 475, 477
Scales <i>v.</i> East London Water Works, 1 Hodges, 91 . . . . .	615
Scale <i>v.</i> Fothergill, 8 Beav. 361 . . . . .	489
Scarborough <i>v.</i> Reynolds, 12 Ala. 252 . . . . .	11, 15
Schenck <i>v.</i> Voorhees, 2 Halst. 383 . . . . .	228
Schoff <i>v.</i> Bloomfield, 8 Vt. 472 . . . . .	12, 86, 556
School-District <i>v.</i> Aldrich, 13 N. H. 140 . . . . .	628
Schultz <i>v.</i> Halsey, 3 Sandf. 405 . . . . .	154, 161
Schuyler <i>v.</i> Van der Veer, 2 Caines, 235 . . . . .	205, 408, 409, 428, 431, 437, 481, 482, 485, 577
Schuykill Bank <i>v.</i> Macalester, 6 Watts & S. 147 . . . . .	78
Scott <i>v.</i> Avery, 5 H. of L. Ca. 811 . . . . .	93, 94
<i>v.</i> Avery, 8 Exch. 487 . . . . .	93
<i>v.</i> Barnes, 7 Barr, 134 . . . . .	59, 64
<i>v.</i> Liverpool Corporation, 28 L. J. Chy. 230 . . . . .	40, 620
<i>v.</i> Van Sandau, 6 Q. B. 237; 1 Q. B. 102 . . . . .	122, 123, 141, 312, 402
<i>v.</i> Wray, 1 Rep. in Chy. 45 . . . . .	606
Scudder <i>v.</i> Johnson, 5 Mis. 551 . . . . .	242
Seal <i>v.</i> Crowe, 3 Lev. 164 . . . . .	590



Seamans v. Pharo, 1 South, 123 . . . . .	160
Searle v. Abbe, 13 Gray, 409 . . . . .	515
Sears v. Vincent, 8 Allen, 507 . . . . .	441, 522, 525, 530, 632
Secombe v. Babb, 6 Mee. & W. 129 . . . . .	625
Secor v. Law, 9 Bosw. 163 . . . . .	209
Seckham v. Babb, 8 Dowl. 167 . . . . .	211, 461, 464
Selby v. Gibson, 1 Har. & J. 362 . . . . .	119
v. Russell, 12 Mod. 139 . . . . .	388, 389
Sellick v. Addams, 15 Johns. 197 . . . . .	55, 65, 174, 264, 280, 281, 510, 513, 516
Shaifer v. Baker, 38 Ga. 135 . . . . .	135
Sharman v. Bell, 5 Maule & Selw. 504 . . . . .	296, 313, 315
Sharpe v. Hancock, 7 Man. & Gr. 354 . . . . .	199, 547, 584
Sharp v. Lipsey, 2 Bailey, 113 . . . . .	245, 247
v. Woodbury, 18 Iowa, 195 . . . . .	595
Shaw v. Hatch, 6 N. H. 162 . . . . .	88
v. Pearce, 4 Binn. 485 . . . . .	224
v. Pitt, W. R. 616, cited in Russell, 3d ed. p. 448 . . . . .	570
Shearer v. Handy, 22 Pick. 417 . . . . .	184, 212, 453, 557
v. Mooers, 19 Pick. 308 . . . . .	80, 526, 576
Shelf v. Bailey, Com. R. 183 . . . . .	14, 204
Shelley v. Wright, Wills. 9 . . . . .	589
Shelling v. Farmer, 1 Strange, 646 . . . . .	520, 566
Shelton v. Alcox, 11 Conn. 240 . . . . .	511, 516, 518, 524, 532
Shephard v. Watrous, 3 Caines, 166 . . . . .	34, 270
Shepherd v. Brand, Cases temp. Hardwicke, 53 . . . . .	536, 625
v. Ryers, 15 Johns. 497 . . . . .	511
Shermer v. Beale, 1 Wash. 11 . . . . .	83, 84
Sherron v. Wood, 5 Halst. 7 . . . . .	542, 543, 596
Sherry v. Oke, 3 Dowl. 349 . . . . .	186
v. Richardson, Pop. 15 . . . . .	401, 449
Shields v. Renno, 1 Overt. 313 . . . . .	241
Shippen's Lessee v. Bush, 1 Dall. 251 . . . . .	84
Shirley v. Shattuck, 4 Cush. 470 . . . . .	265, 348, 422, 463, 627
Shockey's Adm'rs v. Glasford, 6 Dana, 9 . . . . .	51, 59, 83, 85, 121
Short v. Pratt, 6 Mass. 496 . . . . .	153, 155, 161, 162
Shryock v. Morton, 2 Marsh. 563 . . . . .	112
Silmser v. Redfield, 19 Wend. 21 . . . . .	68
Simmonds v. Swaine, 1 Taunt. 548, . . . . .	186, 340, 342, 393, 405, 406, 425, 433, 483, 560
Simon v. Gavil, 1 Salk. 74 . . . . .	268, 553
Simpson v. McBee, 3 Dev. 531 . . . . .	80
Sinclair v. Tallmadge, 35 Barb. 602 . . . . .	89
Sisk v. Garey, 27 Md. 401 . . . . .	332, 535, 542, 543, 595, 609
Sizer v. Burt, 4 Denio, 426 . . . . .	145
Skeels v. Chickering, 7 Metc. 316 . . . . .	395

Skeete, <i>in re</i> , 7 Dowl. 618 . . . . .	203
Skillings v. Coolidge, 14 Mass. 43 . . . . .	45, 402, 437, 439
Skinner v. Andrews, 1 Saund. 169 . . . . .	585, 592
Skipper v. Grant, 10 C. B. 237 . . . . .	184
Skipworth v. Skipworth, 9 Beav. 135 . . . . .	476, 477, 483
Slack v. Buchanan, 1 Peake, N. P. C. 7 . . . . .	567
Sloan v. Smith, 1 Denio, 440 . . . . .	111, 112
Slowman v. Wiggins, 6 C. B. 276 . . . . .	136
Small v. Thurlow, 37 Maine, 79 . . . . .	225, 504
Smalley v. Blackburn Railway Co., 2 Hurl. & Nor. 158 . . . . .	194, 493, 511
Smith v. Barse, 2 Hill, 387 . . . . .	73, 74
v. Bossard, 2 McCord's Chy. 406 . . . . .	15
v. Boston, Concord & Montreal R.R. Co., 36 N. H. 458 . . . . .	40, 93, 95, 96
v. Boston, Concord & Montreal R.R. Co., 36 N. H. 487 . . . . .	89, 91
v. Boston & Maine Railroad Co., 16 Gray, 521 . . . . .	296, 308, 309, 310, 311, 313
v. Briggs, 3 Denio, 73 . . . . .	94
v. Bullock, 16 Vt. 592 . . . . .	258
v. Cutler, 10 Wend. 589 . . . . .	330, 613
v. Demarests, 3 Halst. 195 . . . . .	382
v. Douglas, 16 Ill. 34 . . . . .	51
v. Hartley, 10 C. B. 800 . . . . .	252
v. Holcomb, 99 Mass. 552 . . . . .	504
v. Johnson, 15 East, 213 . . . . .	492
v. Jones, 1 Dowl. N. S. 526 . . . . .	524
v. Kimball, 1 N. H. 72 . . . . .	45
v. Kincaid, 7 Humph. 28 . . . . .	72, 178
v. Kirfoot, 1 Leon. 72 . . . . .	587
v. Pollock, 2 Cal. 92 . . . . .	46, 50
v. Reece, 6 Dowl. & Low. 520 . . . . .	370, 371
v. Sainsbury, 9 Bing. 31 . . . . .	615
v. Smith, 4 Rand. 95 . . . . .	31, 315, 437, 438, 603
v. Smith, 28 Ill. 56 . . . . .	152, 226, 338
v. Sparrow, 16 L. J. Q. B. 139 . . . . .	134
v. Sweeny, 35 N. Y. 291 . . . . .	14, 205, 459, 468
v. Thorndike, 8 Greenl. 119 . . . . .	214, 306
v. Troup, 7 C. B. 757 . . . . .	18
v. Trowsdale, 3 El. & Bl. 83 . . . . .	599
v. Van Nostrand, 5 Hill, 419 . . . . .	14, 15
v. Virgin, 33 Maine, 148 . . . . .	33, 207
Snodgrass v. Gavitt, 28 Penn. St. 221 . . . . .	92
v. Smith, 13 Ind. 393 . . . . .	56
Snook v. Hellyer, 2 Chitty, 43 . . . . .	30, 203, 528
Soilleux v. Herbst, 2 Bos. & P. 444 . . . . .	29

Solomon <i>v.</i> Maguire, 29 Cal. 227 . . . . .	64
<i>v.</i> Solomon, 28 L. J. Exch. 129 . . . . .	150, 615
Somers <i>v.</i> Balabrega, 1 Dall. 164 . . . . .	15
Soulsby <i>v.</i> Hodgson, 3 Burrows, 1474 . . . . .	167
Southard <i>v.</i> Steele, 3 Monr. 435 . . . . .	8
South Carolina R.R. Co. <i>v.</i> Moore, 28 Geo. 398 . . . . .	47
South Sea Company <i>v.</i> Bumstead, 2 Eq. Ca. Abr. 80 . . . . .	218, 219, 540, 610, 613
Spaulding <i>v.</i> Irish, 4 Serg. & R. 322 . . . . .	422
<i>v.</i> Warren, 25 Vt. 316 . . . . .	71, 208
Sparrow <i>v.</i> Carruthers, 2 Bos. & P. 226 . . . . .	28
Spear <i>v.</i> Hooper, 22 Pick. 144 . . . . .	437, 441
<i>v.</i> Myers, 6 Barb. 445 . . . . .	139, 145, 147
<i>v.</i> Stacy, 26 Vt. 61 . . . . .	298
Spence <i>v.</i> Eastern Counties Railway Co., 7 Dowl. 697 . . . . .	277
<i>v.</i> Stuart, 3 East, 89 . . . . .	134
Spencer <i>v.</i> Newton, 6 Ad. & El. 623 . . . . .	134
<i>v.</i> Spencer, 2 Younge & Jer. 249 . . . . .	494
Sperry <i>v.</i> Ricker, 4 Allen, 17 . . . . .	362, 363, 367
Spettigue <i>v.</i> Carpenter, 3 P. Wms. 361 . . . . .	145, 542
Spigurnell <i>v.</i> Jene, 1 Sid. 12 . . . . .	180
Spofford <i>v.</i> Spofford, 10 N. H. 254 . . . . .	265, 267, 331, 379, 627
Spooner <i>v.</i> Payne, 16 L. J. C. P. 225 . . . . .	593, 600
Spruck <i>v.</i> Crook, 19 Ill. 415 . . . . .	214, 571
Squire <i>v.</i> Grevell, 6 Mod. 34 . . . . .	578
<i>v.</i> Grevett, 2 Ld. Raym. 961 . . . . .	193, 465, 553
Stafford <i>v.</i> Heskett, 1 Ward. 71 . . . . .	226
Stains <i>v.</i> Wild, Cro. Jac. 352 . . . . .	378
Stalworth <i>v.</i> Inns, 2 Dowl. & Low. 428 . . . . .	152, 153, 157, 572
<i>v.</i> Inns, 13 Mee. & W. 466 . . . . .	614
Standley <i>v.</i> Hemmington, 6 Taunt. 561 . . . . .	195, 550
Stanton <i>v.</i> Henry, 11 Johns. 133 . . . . .	261
State <i>v.</i> Jones, 2 Gill, 49. . . . .	185, 198
<i>v.</i> Pitticrew's Ex'r, 19 Mis. 373. . . . .	278
Stead <i>v.</i> Salt, 3 Bingham. 101 . . . . .	8
Steers <i>v.</i> Lashley, 6 Term. 61 . . . . .	489, 505
Steff <i>v.</i> Andrews, 2 Mod. 6 . . . . .	54, 295, 315
Steiglitz <i>v.</i> Egginton, Holt, 141 . . . . .	8
<i>v.</i> Egginton, 8 Serg. & Lowb. 54 } . . . . .	
Stephenson <i>v.</i> Browning, Barnes, 56 . . . . .	625
Stephens <i>v.</i> Matthews, 1 Ld. Raym. 116. . . . .	193, 554
Stevenson <i>v.</i> Beeker, 1 Johns. 492 . . . . .	68
Steward <i>v.</i> East India Co., 2 Vern. 380 . . . . .	620
Stewart <i>v.</i> Cass, 16 Vt. 663 . . . . .	51, 52, 266, 514
<i>v.</i> Waldron, 41 Maine, 486 . . . . .	109
Stickles <i>v.</i> Arnold, 1 Gray, 418 . . . . .	254, 352, 414, 441

Stiles v. Triste, 1 Sid. 54 . . . . .	383
Still v. Halford, 4 Camp. 17 . . . . .	529, 600
St. Martin v. Mestayé, 18 La. An. 320 . . . . .	79
Stokeley v. Robinson, 34 Penn. St. 315 . . . . .	15, 16, 18
Stokes v. Lewis, 2 Smith, 12 . . . . .	625
Stone v. Dennis, 3 Porter, 231 . . . . .	91
v. Knight, Latch. 207, Noy, 93 . . . . .	26
v. Phillips, 4 Bing. N. C. 37 . . . . .	345, 453, 454
Stonehewer v. Farrar, 6 Q. B. 730 . . . . .	199, 362, 438, 449, 487
Storey v. Bloxham, 2 Esp. 503 . . . . .	592
Stork v. De Smith, Willes, 66 . . . . .	454
Strang v. Ferguson, 14 Johns. 161 . . . . .	628
Strangford v. Green, 2 Mod. 228 . . . . .	8, 9, 380
v. Palmer, 12 Mod. 234 . . . . .	380
Stratton v. Green, 8 Bing. 437 . . . . .	623
v. Mason, 15 Pick. 508 . . . . .	201
Strawbridge v. Funstone, 1 Watts & S. 517 . . . . .	54
Street v. Rigby, 6 Ves. Jr. 815 . . . . .	89, 91, 96, 131
Strike v. Benstey, 1 Lutw. 525 . . . . .	590
Strodes v. Patton, 1 Brock. 228 . . . . .	19, 20, 23
Strong v. Beroujon, 18 Ala. 168 . . . . .	25
v. Elliot, 8 Cow. 27 . . . . .	538
v. Strong, 9 Cushing, 560 . . . . .	102, 108, 172, 265, 332, 347, 348, 350, 355, 362, 391, 409, 423, 424, 446, 448, 534
Strutt v. Rogers, 7 Taunt. 212 . . . . .	463, 623, 624
Stuart v. Nicholson, 3 Bing. N. C. 113 . . . . .	602
Sudam v. Swart, 20 Johns. 476 . . . . .	149, 150
Summerville v. Painter, 44 Penn. St. 110 . . . . .	33
Sumner v. Brown, 34 Vt. 194 . . . . .	207, 208
Sumpter v. Murrell, 2 Bay, 450 . . . . .	321
Sutcliffe v. Brooke, 15 L. J. Exch. 118 . . . . .	586
Sutherland v. Rose, 47 Barb. 144 . . . . .	435
Sutton v. Dickenson, 9 Leigh, 142 . . . . .	206
v. Tyrrell, 10 Vt. 91 . . . . .	229, 233, 235, 236
Swayze v. Kerkendall, 2 Penning. 660 . . . . .	112
Sweet v. Hole, Cas. temp. Finch, 384 . . . . .	606
Sweetser v. Kenny, 32 Maine, 464 . . . . .	214, 217, 218, 294
Swicard v. Wilson, 2 Rep. Con. Ct. 218 . . . . .	19
Swift v. Harriman, 30 Vt. 607 . . . . .	71
Swinford, <i>in re</i> , 6 Maule & Sel. 226 . . . . .	225
v. Burn, Gow N. P. 5 . . . . .	489
Sybray v. White, 1 Mee. & W. 435 . . . . .	487, 488
Symes v. Goodfellow, 2 Bing. N. C. 532 . . . . .	137
Symonds v. Mayo, 10 Cush. 39 . . . . .	63
v. Mills, 8 Taunt. 526 . . . . .	561

## T.

Talbot v. McGee, 4 T. B. Monroe, 377 . . . . .	15
Tallman v. Tallman, 5 Cush. 325 . . . . .	22, 24, 350, 362, 446, 631
Tandy v. Tandy, 9 Dowl. 1044 . . . . .	194, 211, 397, 454, 472, 612
Tattersall v. Groote, 2 Bos. & Pul. 131 . . . . .	90, 91
Taylor v. Coryell, 12 Serg. & R. 243 . . . . .	8
v. Lady Gordon, 9 Bing. 570 . . . . .	623
v. Marling, 2 Man. & Gr. 55 . . . . .	527, 528
v. Parry, 1 Man. & Gr. 604 . . . . .	55
v. Sayre, 4 Zab. 647 . . . . .	71
v. Shuttleworth, 8 Dowl. 281 . . . . .	199, 482, 528
Teale v. Younge, McLel. & Y. 497 . . . . .	312
Tebbutt v. Ambler, 2 Dowl. N. S. 677 . . . . .	195
Temple, <i>ex parte</i> , 2 Ves. & B. 395 . . . . .	134
Templeman and Reed, <i>in re</i> , 9 Dowl. 962 . . . . .	159, 449
Tetter v. Rapesnyder, 1 Dall. 293 . . . . .	164
Thaire v. Thaire, Palm. 109 . . . . .	261
Thayer v. Bacon, 3 Allen, 163 . . . . .	38
Thinne v. Rigby, Cro. Jac. 314 . . . . .	194, 388, 406, 432, 454, 457, 481
Thomas v. Harrop, 1 Sim. & St. 524 . . . . .	159, 278
v. Hewes, 2 C. & M. 519 . . . . .	17
v. Leach, 2 Mass. 152 . . . . .	29
v. Reab, 6 Wend. 503 . . . . .	68
Thomlinson v. Arriskin, Com. Rep. 328 . . . . .	378, 588
Thompson v. Charnock, 8 Term, 139 . . . . .	89
v. Mitchell, 35 Maine, 281 . . . . .	153, 154, 228, 260, 287, 290, 589
v. Noel, 1 Atk. 60 . . . . .	519, 605, 608
v. White, 4 Serg. & R. 135 . . . . .	79
Thomson v. Austin, 2 Dowl. & Ry. 358 . . . . .	568
Thoreau v. Pallies, 5 Allen, 354 . . . . .	446, 631
Thorp v. Cole, 2 Cr. Mee. & Ros. 367 . . . . .	169, 170, 388, 391, 412, 417, 419
v. Cole, 4 Dowl. 457 . . . . .	474, 489, 625
Thorpe v. Eyre, 1 Ad. & El. 926 . . . . .	512, 513, 521
Thrasher v. Haynes, 2 N. H. 429 . . . . .	66, 474, 476, 477
Threlfall v. Fanshawe, 19 L. J. Q. B. 334 . . . . .	577, 626
Thursby v. Helbert, Carth. 159 . . . . .	204, 456, 462
Tilford v. French, 1 Sid. 160 . . . . .	578, 587
Tillam v. Copp, 5 C. B. 211 . . . . .	115, 127, 130
Tinney v. Ashley, 15 Pick. 546 . . . . .	549, 551, 556
Tipping v. Smith, 2 Strange, 1024 . . . . .	269, 432
Tittenson v. Peat, 3 Atk. 529 . . . . .	543, 609, 613, 620
Titus v. Perkins, Skin. 247 . . . . .	409
v. Scantling, 4 Blackf. 89 . . . . .	43, 50
Tobey v. County of Bristol, 3 Story, 800 . . . . .	80, 89, 131, 134, 230

Toby v. Lovibond, 17 L. J. C. P. 201 . . . . .	193, 310
Todd v. Barlow, 2 Johns. Chy. 551 . . . . .	542, 616
Tollit v. Saunders, 9 Price, 612 . . . . .	242
Tolman v. Sparhawk, 5 Metc. (Mass.) 476 . . . . .	51
Tomlin v. Mayor of Fordwich, 6 Nor. & M. 594 . . . . .	53, 392, 394, 474, 481, 574, 583, 587
Tomlinson v. Hammond, 8 Clarke, 40 . . . . .	57
Tompkins v. Corwin, 9 Cow. 255 . . . . .	583
Towne v. Jaquith, 6 Mass. 46 . . . . .	162, 272
Towns v. Wilcox, 12 Wend. 503 . . . . .	73
Townsend v. Masterson Stone Dressing Co., 15 N. Y. 587 . . . . .	87
Tracy v. Herrick, 25 N. H. 381 . . . . .	172, 174, 459, 460, 539, 540
Travers v. Lord Stafford, 2 Ves. Sen. 19 . . . . .	489
Tredwen v. Holman, 31 L. J. Exch. 398 . . . . .	93
Trew v. Burton, 1 Cr. & Mee. 533 . . . . .	226, 278, 329, 333
Tribe v. Upperton, <i>in re</i> , 3 Ad. & El. 295 . . . . .	415, 612
Trimingham v. Trimingham, 4 Nev. & Man. 786 . . . . .	493, 572
Trout v. Emmons, 29 Ill. 433 . . . . .	11
Trusloe v. Yewre, Cro. Eliz. 223 . . . . .	512
Tryer v. Shaw, 27 L. J. Exch. 320 . . . . .	122
Tudor v. Peck, 4 Mass. 242 . . . . .	84
v. Scovell, 20 N. H. 174 . . . . .	174, 260, 264
Tunno v. Bird, 5 B. & Ad. 488 . . . . .	247
Turner v. Rose, 1 Ld. Kenyon, 393 . . . . .	625
v. Swainson, 1 Mee. & W. 572 . . . . .	181, 211, 398
v. Turner, 3 Russell, 494 . . . . .	345, 353
Tuscaloosa Bridge Co. v. Jemison, 33 Ala. 476 . . . . .	47
Tyler v. Dyer, 13 Maine, 41 . . . . .	48, 214, 217, 294, 463
v. Jones, 3 Barn. & Cr. 144 . . . . .	233
Tyson v. Robinson, 3 Ired. 333 . . . . .	226, 230, 232, 233

## U.

Underhill v. Van Cortlandt, 2 Johns. Chy. 339 . . . . .	41
v. Van Cortlandt, 17 Johns. 405. See Van Cortlandt v.	
Underhill . . . . .	41
Underwood v. Bedford & Cambridge Railway Co., <i>in re</i> , 11 C. B.	
n. s. 442 . . . . .	275
Union Bank v. Mott, 18 How. Pr. 506 . . . . .	209
United States v. Ames, 1 Wood. & Min. 73, 76 . . . . .	30, 314
v. Robeson, 9 Pet. 327 . . . . .	93
Unsted v. Kidd, 1 Chitty R. 526 . . . . .	626
Upton v. Upton, 1 Dowl. 400 . . . . .	505

## V.

Valentine v. Valentine, 2 Barb. Chy. 430 . . . . .	50, 52, 256, 579
Valle v. North Missouri R.R. Co., 37 Mis. 445 . . . . .	172, 259, 571
Van Alstyne v. Wimple, 4 Cow. 547 . . . . .	77
Van Antwerp v. Stewart, 8 Johns. 125 . . . . .	233
Van Buskirk v. Stow, 42 Barb. 9 . . . . .	209
Van Cortlandt v. Underhill, 17 Johns. 405 . . . . .	143, 243, 536, 539
Vandenhoof v. Dean, 1 Mann. (Mich.) 463 . . . . .	71, 73
Vanlore v. Tribb, Rolle's Abr. Arb. N. 1, p. 258 . . . . .	465
Van Slyke v. Lettice, 6 Hill, 610 . . . . .	76
Varney v. Brewster, 14 N. H. 49 . . . . .	231, 342, 343, 345, 487, 490, 507, 509, 577
Vasques, <i>ex parte</i> , 5 Cow. 29 . . . . .	80
Vaughn v. Graham, 11 Miss. 575 . . . . .	112
Veale v. Warner, 1 Saund. 327 . . . . .	279, 378, 542, 543, 590, 597, 612
Vosburgh v. Bame, 14 Johns. 302 . . . . .	268
Vose v. How, 13 Metc. 243 . . . . .	627, 628

## W.

Waddle v. Downman, 12 Mee. & W. 562 . . . . .	410, 423
Wade v. Dowling, 4 El. & Bl. 44 . . . . .	153, 594
v. Powell, 31 Geo. 1 . . . . .	15, 280
Waite v. Barry, 12 Wend. 377 . . . . .	385, 390, 420, 422, 597
Wakeman v. Dalley, 44 Barb. 498 . . . . .	600
Walker v. Frobisher, 6 Ves. Jr. 70 . . . . .	126, 199
v. Melcher, 14 Mass. 148 . . . . .	153, 155
v. Merrill, 13 Maine, 173 . . . . .	437, 463, 627
v. Sanborn, 8 Greenl. 288 . . . . .	214, 294, 300, 335
v. Walker, 1 Wins. (N. C.) No. 1259 . . . . .	214, 571
Waller v. King, 9 Mod. 63 . . . . .	122
Wallis v. Carpenter, 13 Allen, 19 . . . . .	101, 233
Walsh v. Gilmor, 3 Har. & J. 383 . . . . .	178
Walters v. Morgan, 2 Cox Chy. 369 . . . . .	50, 51, 603, 605, 607
Walton v. Swannage Pier Co., 10 W. R. 629 . . . . .	570
Waltonshaw v. Marshall, 1 H. & W. 209 . . . . .	247
Walworth County Bank v. Farmers' Loan & Trust Co., 22 Wis. 231 . . . . .	105
Warburton v. Storr, 4 Barn. & Cr. 103 . . . . .	230, 239
Ward v. American Bank, 7 Metc. 486 . . . . .	305, 313, 315, 338, 373, 566
v. Dean, 3 B. & Ad. 234 . . . . .	229, 323
v. Gould, 5 Pick. 291 . . . . .	226, 435, 562
v. Hall, 9 Dowl. 610 . . . . .	441, 469

Ward <i>v.</i> Perram, 2 Ves. Sen. 315 . . . . .	620
<i>v.</i> Unicorn, Cro. Car. 216 . . . . .	365
Warfield <i>v.</i> Holbrook, 20 Pick. 531 . . . . .	356, 360, 361, 504, 612
Warley <i>v.</i> Beckwith, Hob. 218 . . . . .	473
Warner, <i>in re</i> , 2 Dowl. & L. 148 . . . . .	28, 381
Warren <i>v.</i> Green, Ca. temp. Finch, 141 . . . . .	211
Waterman <i>v.</i> Connecticut & Passumpsic Riv. R.R. Co., 30 Vt. 610 . . . . .	70, 207
Waters <i>v.</i> Bridge, Cro. Jac. 639 . . . . .	589
Watkins <i>v.</i> Philpotts, McLel. & Y. 393 . . . . .	277, 454, 470, 475
Watson <i>v.</i> Trower, Ryl. & M. 17 . . . . .	247
<i>v.</i> Watson, Sty. 28 . . . . .	409
Waugh <i>v.</i> Mitchell, 1 Dev. & Bat. Eq. 510 . . . . .	402
Wear <i>v.</i> Ragan, 30 Miss. 83 . . . . .	74
Webb <i>v.</i> Ingram, Cro. Jac. 663 . . . . .	442, 461
<i>v.</i> Taylor, 1 Dowl. & Low. 676 . . . . .	134
Webber <i>v.</i> Ives, 1 Tyler, 441 . . . . .	118, 124
Webster <i>v.</i> Lee, 5 Mass. 334 . . . . .	501, 502, 505, 506
Weed <i>v.</i> Ellis, 3 Caines, 253 . . . . .	25
Wellington <i>v.</i> Mackintosh, 2 Atk. 569 . . . . .	89, 131
Wells <i>v.</i> Lain, 15 Wend. 99 . . . . .	43, 44, 46, 50, 73, 74
Wells, Matter of, 1 N. Y. Legal Obs. 189 . . . . .	131, 133
Wesson <i>v.</i> Newton, 10 Cush, 114 . . . . .	8
West <i>v.</i> Stanley, 1 Hill, 69 . . . . .	73
Westlake <i>v.</i> Collard, Bull. N. P. 7th ed. 236 b. . . . .	567
Weston <i>v.</i> Stuart, 2 Fairf. 326 . . . . .	19, 25, 26, 28, 57, 316
Westwood <i>v.</i> Secretary for India, 1 N. R. 262 . . . . .	93
Wharton <i>v.</i> King, 2 Barn. & Ad. 523 . . . . .	368, 405, 483, 560
Whatley <i>v.</i> Morland, 2 Dowl. 249 . . . . .	130, 150, 151, 536
Wheatley <i>v.</i> Martin's Adm'r, 6 Leigh, 62 . . . . .	19, 20, 23, 234
Wheeler <i>v.</i> Van Houten, 12 Johns. 311 . . . . .	487, 495, 497, 505
White <i>v.</i> Fox, 29 Conn. 570 . . . . .	10, 47, 175
<i>v.</i> Gifford, Rolle's Abr. Auth. E. 4, p. 333 . . . . .	235
<i>v.</i> Kemble, 2 Penn. 349 . . . . .	224
<i>v.</i> Puryear, 10 Yerger, 441 . . . . .	224, 225, 226
<i>v.</i> Sharp, 12 Mee. & W. 712 . . . . .	159, 278
<i>v.</i> Story, 43 Barb. 124 . . . . .	57
White Mountains Railroad <i>v.</i> Beane, 39 N. H. 107 . . . . .	214, 294, 296, 297, 300
Whiteacre <i>v.</i> Pawlin, 2 Vern. 229 . . . . .	30
Whitehead <i>v.</i> Firth, 12 East, 166 . . . . .	463
<i>v.</i> Tattersall, 1 Ad. & El. 491 . . . . .	252, 487, 488
Whitmore <i>v.</i> Le Ballistier, 35 Me. 488 . . . . .	214, 294
<i>v.</i> Smith, 31 L. J. Exch. 107 . . . . .	327, 542, 595
<i>v.</i> Smith, 5 Hurl. & Nor. 824 . . . . .	167
Whitney <i>v.</i> Cook, 5 Mass. 139 . . . . .	24, 631



Whitney v. Holmes, 15 Mass. 152 . . . . .	51, 511
Whittemore v. Whittemore, 2 N. H. 26 . . . . .	499, 502
Wightman v. Pettis, 29 Penn. St. 283 . . . . .	87
Wilcox v. Singletary, Wright, 420 . . . . .	8
Wild v. Holt, 9 Mee. & W. 161 . . . . .	269
Wilde v. Vinor, 1 Brownl. 62 . . . . .	231
Wiles v. Peck, 26 N. Y. 42 . . . . .	55, 532
Wilkinson v. Godefroy, 9 Ad. & El. 536 . . . . .	546
v. Page, 1 Hare, 276 . . . . .	54, 191, 346, 347, 368
Wilks v. Back, 2 East, 142 . . . . .	10, 12
Williams, <i>in re</i> , 4 Denio, 194 . . . . .	332, 386, 571, 612
v. Craig, 1 Dall. 313 . . . . .	322
v. Hayes, 20 N. Y. 58 . . . . .	145
v. Jones, 5 Man. & Ry. 3 . . . . .	310, 313, 315
v. Lewis, 3 Jur. N. s. 1324; 7 El. & Bl. 929 . . . . .	33
v. Mouldsdales, 7 Mee. & W. 134 . . . . .	205, 351
v. Paschall, 4 Dall. 285 . . . . .	321
v. Paschall's Heirs, 3 Yeates, 564 . . . . .	586
v. Walton, 19 Cal. 142 . . . . .	48
v. Warren, 21 Ill. 541 . . . . .	193
v. Williams, 11 Sm. & M. 393 . . . . .	602
v. Wood, 1 Dev. 82 . . . . .	43
Willingham v. Harrell, 36 Ala. 583 . . . . .	44
Wills v. Maccormick, 2 Wils. 148 . . . . .	542, 544
Wilson v. Constable, 1 Lutw. 536 . . . . .	585
v. Getty, 57 Penn. St. 266 . . . . .	52
v. King, 2 Cr. & Mee. 689 . . . . .	136
v. Wilson, 1 Saund. 327 . . . . .	280, 283
v. Young, 9 Barr, 101 . . . . .	15, 18, 19
Winch v. Saunders, 2 Rolle's Rep. 214, Cro. Jac. 584 . . . . .	388, 389, 391, 454, 456
Winn v. Nicholson, 7 C. B. 819 . . . . .	618
Winne v. Elderkin, 1 Chandl. 219 . . . . .	43, 50
Winship v. Jewett, 1 Barb. Ch. 173 . . . . .	111
Winsor v. Griggs, 5 Cush. 210 . . . . .	14, 124
Winter v. Garlick, 6 Mod. 195 . . . . .	625
v. Lethbridge, 13 Price, 533 . . . . .	199, 202, 316, 466
v. Munton, 2 Moore, 723 . . . . .	370, 612
v. White, 3 Moore, 674 . . . . .	574, 581
Winteringham v. Robertson, 27 L. J. Exch. 301 . . . . .	244
Withers v. Haines, 2 Barr, 435 . . . . .	46, 77
Withington v. Warren, 10 Metc. 431 . . . . .	320, 338, 568
Woglam v. Burnes, 1 Binney, 109 . . . . .	453
Wohlenberg v. Lageman, 6 Taunt. 250 . . . . .	53, 221, 412
Wood v. Adcock, 7 Exch. 468 . . . . .	353
v. Auburn & Rochester R.R. Co., 4 Seld. 160 . . . . .	6, 10

Wood v. Griffith, 1 Swanst. 55 . . . . .	181, 362, 603, 605, 608
v. Holden, 45 Maine, 374 . . . . .	45
v. Hotham, 5 Mee. & W. 674 . . . . .	221
v. Leake, 12 Ves. Jr. 412 . . . . .	122
v. North Staffordshire Railway Co., 13 Jur. 466 . . . . .	609
v. O'Kelly, 9 East, 436 . . . . .	624, 626
v. Page, 37 Vt. 252 . . . . .	66, 72, 82
v. Shepherd, 2 P. & H. (Va.) 442 . . . . .	8, 9
v. Thompson, Rolle's Abr. Arb. F. 11, p. 249 . . . . .	203
v. Wilson, 23 C. M. & R. 241 . . . . .	189, 190, 211, 587
Woodbury v. Northy, 3 Greenl. 85 . . . . .	211, 214, 226, 229, 290, 571, 578, 580, 588
v. Proctor, 9 Gray, 18 . . . . .	84
Woodcroft v. Jones, 9 Dowl. 538 . . . . .	93
Woodrow v. O'Conner, 28 Vt. 776 . . . . .	111
Woodruff v. Hurson, 32 Barb. 557 . . . . .	209, 210
Woodward v. Atwater, 3 Clarke, 61 . . . . .	53, 62
Woodworth v. Van Buskerk, 1 Johns. Ch. 432 . . . . .	150
Woolson v. Boston & Worcester Railroad Corporation, 103 Mass. 580 . . . . .	630
Worrall v. Deane, 2 Dowl. 263 . . . . .	613
Worrel v. Atworth, Sid. 358 . . . . .	389
Worthen v. Stevens, 4 Mass. 448 . . . . .	182, 212
Worthington v. Barlow, 7 Term, 453 . . . . .	21, 488
Wright & Cromford Canal Co., <i>in re</i> , 1 Q. B. 98 . . . . .	310
Wright, <i>ex parte</i> , 6 Cowen, 399 . . . . .	74
v. Graham, 3 Exch. 131 . . . . .	153
v. Raddin, 100 Mass. 319 . . . . .	49
v. Smith, 19 Vt. 110 . . . . .	290, 578, 580, 588
v. Wright, 5 Cow. 197 . . . . .	340, 345, 359, 362
Wrightson v. Bywater, 3 Mee. & W. 199 . . . . .	340, 341, 342, 343, 349, 350, 375, 381
Wyatt v. Benson, 23 Barb. 327 . . . . .	4
v. Curnell, 1 Dowl. n. s. 327 . . . . .	350
Wyman v. Hammond, 55 Maine, 534 . . . . .	182
Wynn v. Bellas, 34 Penn. St. 160 . . . . .	46
Wynne v. Edwards, 12 Mee. & W. 708 . . . . .	364
v. Wynne, 4 Man. & Gr. 253 . . . . .	547

## Y.

Yarborough v. Leggett, 14 Tex. 677 . . . . .	19
Yates v. Russell, 17 Johns. 461 . . . . .	75, 81, 161
Yeamans v. Yeamans, 99 Mass. 585 . . . . .	86

York & Cumberland, R.R. Co. <i>v.</i> Myers, 18 How. (U. S.) 246	208, 294, 571
Young <i>v.</i> Bulman, 13 C. B. 623 . . . . .	156, 625
<i>v.</i> Gye, 10 Moore, 198 . . . . .	624
<i>v.</i> Reynolds, 4 Md. 375 . . . . .	125
<i>v.</i> Walter, 9 Ves. Jr. 364 . . . . .	54, 216, 219, 295, 296, 305, 315



# PART I.

PARTIES—THE SUBMISSION.



# ARBITRATION AND AWARD.

---

## CHAPTER I.

### PARTIES TO THE SUBMISSION.

Must be competent to contract.

Must have Power in relation to Subject-matter.

Infants.

Corporations.

Selectmen.

Overseers of the poor.

Partners.

Agents.

1. Principals not bound.

2. Principal bound, originally ;  
or by subsequent proceedings.

3. The Agent personally bound.

Incidental powers of Agent authorized to submit.

Submissions by Counsel in *lis pendens*.

Executors and Administrators.

Guardians.

Husband and Wife ; Married Women.

United States District Attorney.

Assignees in Bankruptcy.

Bankrupts.

Persons having a Joint Interest.

Persons bound in Severalty.

Parties to a *lis pendens*.

Duress.

**Must be Competent to Contract.** — A submission is a contract ; consequently the parties must have a general legal capacity to contract. They must be of sound mind ; they must be of full age ; they must act freely and not under threats or duress.

**Must have Power in relation to Subject-matter.** — For the purposes of this especial contract, they must have such power

in relation to the subject-matter of the submission as will enable them to carry into effect any orders which could be legally and properly laid upon them by the award.<sup>1</sup>

If parties enter into a submission concerning a subject-matter over which one of them has no authority, an award ordering such party to do that which he cannot lawfully do, will be of no effect whatsoever. It is a simple nullity. Thus, where a religious corporation, having no power to sell its real estate except with consent of the Supreme Court, submitted to arbitration the question of sale, and the arbitrators ordered the sale to be made, it was held that their award had no force or effect whatsoever.<sup>2</sup>

**Infants.**—The agreement of an infant to submit to arbitration is like any other contract into which he might enter. There is an old English case in which his undertaking is declared absolutely void.<sup>3</sup> But the later and conclusive authorities hold it to be only voidable.<sup>4</sup> The presumed incompetency of the infant to have a proper care for his own interests will be kept by the courts within reasonable bounds. Thus, where an infant's claim for damage for an assault and battery had been submitted and the amount awarded had been paid him, in a subsequent suit brought by him for the same cause of action it was held that the jury should take into consideration the sum paid; if they thought it sufficient compensation they should give only nominal damages; if they thought it insufficient, they should make up the deficiency.<sup>5</sup>

Whether or not equity will decree an award to be binding upon an infant seems a matter of doubt, depending much upon the merits of the case.<sup>6</sup> There are instances in which it has

<sup>1</sup> *Bean v. Farnam*, 6 Pick. 269; *Brady v. Mayor of Brooklyn*, 1 Barb. 584; *Wyatt v. Benson*, 23 id. 327.

<sup>2</sup> *Wyatt v. Benson*, 23 Barb. 327.

<sup>3</sup> *Rudston v. Yates*, March, 111, 141; 1 Rolle Ab. Arb. A. 268.

<sup>4</sup> *Baker v. Lovett*, 6 Mass. 78; *Godfrey v. Wade*, 6 Moore, 488; *Harvey v. Ashley*, 3 Atk. 607; *Holt v. Ward*, Fitzgibbon, 175, 275; *Russell on Arb.* 3d ed. 18; *Britton v. Williams*, 6 Munf. 453.

<sup>5</sup> *Baker v. Lovett*, 6 Mass. 78.

<sup>6</sup> *Russell on Arb.* 19.



done so,<sup>1</sup> and instances in which it has refused to do so.<sup>2</sup> The objection to awards under submissions to which infants are parties is usually based upon the want of mutuality.

**Corporations.**—A corporation may be a party to a submission.<sup>3</sup> The custom is universal, and has been seldom questioned. Such objections as have been made have usually been aimed at the manner in which the corporation has assumed to become bound. In England it is said that the reference must be an act of the corporate body; and it has even been questioned whether an attorney would not require a special authority under the corporate seal to enable him to refer a cause.<sup>4</sup> In the United States formalities are less insisted upon. A power to “agree with the proprietor” of land “for the purchase,” &c., was held to authorize an agreement to pay such sum as arbitrators should award; and it was declared to be needless to inquire whether the power to direct the proceedings in the suit and to agree to a reference lay with the president and directors or with the stockholders; for the corporation, being a party defendant in court, was represented by its counsel, and his agreement to refer would be presumed to be duly authorized; and the court refused, accordingly, to go behind it.<sup>5</sup>

Another case goes further in the same direction. A railroad company, having power to buy lands at prices to be fixed by arbitrators, made H. their general agent, and he, with knowledge of the officers, created T. his sub-agent. H. and T. bought lands for the company and submitted the price to arbitration, and the financial officers were ordered to pay and did pay the sums awarded. By frequent repetition this became the established course of business. Held, that H. and T. could bind the

<sup>1</sup> Bishop of Bath & Wells *v.* Hippesley, cited in Harvey *v.* Ashley, 3 Atk. 607.

<sup>2</sup> Cavendish *v.* ———, Eq. Ca. Ab. 49; s. c. 1 Ca. in Chanc. 279; Evans *v.* Cogan, 2 P. Wms. 450.

<sup>3</sup> Brady *v.* Mayor of Brooklyn, 1 Barb. 584; Alexandria Canal Co. *v.* Swan, 5 How. (U. S.) 83; Russell on Arb. 21; Attorney-General *v.* Clements, 1 Turn. & R. 58.

<sup>4</sup> Russell on Arb. 21.

<sup>5</sup> Alexandria Canal Co. *v.* Swan, 5 How. (U. S.) 83.

company by an agreement to submit, not alone because the company would be estopped to deny their authority, but because the past conduct of the company had "actually conferred" the authority.<sup>1</sup> So again: Directors of an insurance company entered on their books a proposal to arbitrate a disputed claim and a request to the claimant to join with the secretary in selecting the arbitrators. Held, that the secretary's execution of a submission for the company under the corporate seal, was binding on the company.<sup>2</sup>

Where a committee assumes to submit on behalf of a corporation, and recites that it is "duly and legally" authorized to do so, the presumption is in favor of the existence of the authority. The fact that a vote empowering them to submit one matter is silent as to another matter which also they have submitted, will not by itself overcome this presumption; for *non constat* that the authority was not conferred by some other vote or proceeding.<sup>3</sup>

**Selectmen.** — The powers of selectmen to submit to arbitration on behalf of the town are not distinctly defined. Generally their submissions have been upheld, as will be seen by the cited cases. Though in Connecticut it was said that under the general phrase "to superintend the general affairs of the town," it would be "difficult to find authority for submitting claims against it."<sup>4</sup> But selectmen having power "to audit and allow" claims, may submit *such claims* to reference.<sup>5</sup> And selectmen, having statutory power to widen streets and to agree with the parties damaged, may enter into a submission with the abutters to determine the sums to be paid to or by them severally; and such an agreement, signed by a committee of the selectmen, binds the town.<sup>6</sup> So the common council,

<sup>1</sup> *Wood v. Auburn & Rochester R.R. Co.*, 4 Seld. (8 N. Y.) 160.

<sup>2</sup> *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

<sup>3</sup> *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. 38.

<sup>4</sup> *Griswold v. North Stonington*, 5 Conn. 367.

<sup>5</sup> *Dix v. Town of Dummerston*, 19 Vt. 262.

<sup>6</sup> *Inhabitants of Boston v. Brazer*, 11 Mass. 447.

authorized to grade streets, to assess damages, and to collect the money, may bind the city by a submission to arbitration of questions arising out of the business.<sup>1</sup>

**Overseers of the Poor** have no authority, *virtute officii*, to submit to arbitration the claim of a pauper.<sup>2</sup>

**Partners.**—The weight of authority is clearly in favor of the rule that one partner cannot bind his copartners by a submission to arbitration. A distinction has sometimes been drawn between submissions by parol and submissions under seal, as if the former might be valid, though the latter could not be so by reason of the doctrine that a partner cannot bind the firm by a deed or by any instrument under seal, save only a release of indebtedness. Where the submission has been by a sealed instrument, the courts have often avoided the difficulties of the general question, and sheltered themselves behind this principle. In many cases, however, even parol submissions have been held void; and the text books usually prefer this view. The ground taken is, that a partner has implied authority to bind his copartners only in matters relating to the regular course of the partnership business, and that a reference to arbitration cannot be considered to be among such matters. Also that the copartners cannot be presumed to be willing to abandon their rights to seek justice through ordinary channels of the law, or to have authorized another to make such abandonment for them, unless some proof of the fact in the shape of a special authorization exists. Some few other authorities, all arising in the courts of the United States, take a contrary position, and give this power to a single partner. The cases are collected and as nearly as possible are classified in the foot-note.<sup>3</sup>

<sup>1</sup> *Brady v. Mayor of Brooklyn*, 1 Barb. 584.

<sup>2</sup> *Furbish v. Hall*, 8 Me. (Greenl.) 315.

<sup>3</sup> *Parsons on Contracts*, Vol. I. 191; *Story on Partnership*, §§ 114–116; *Russell on Arb.* 20; *Collyer on Partnership*, 238, 260; all deny generally the right of one partner to bind the firm. The following cases deny the right of one partner to bind by sealed instrument: *Eastman v. Burleigh*, 2 N. H. 484; *Buchanan*

But any manner of actual authority given to one partner by his copartners will suffice to empower that partner to bind the firm. Such authorization need not be in any formal shape; so long as it is a distinct expression of the intent of the copartners to allow one to act for them in making such an agreement, it will be sufficient.<sup>1</sup> Presence of the authorizing partners at the time of signature is not necessary; but it seems that if they are not present at the time, the authority must have been previously given. And at any rate it will be too late for the non-signing partner to come forward and ratify after an award in his favor has been rendered, and thereby entitle himself to obtain the benefits of the award when he has taken no part in the previous proceedings whereby he could have been held bound by it had it been against him.<sup>2</sup> But even the actual presence of the non-signing partner at the time of the signature by his copartner, is only evidence of his assent, and is not conclusive of the fact. Thus, where he was a foreigner and it was proved that he understood English imperfectly and did not comprehend what was passing or what his partner was undertaking, he was held not bound by the submission.<sup>3</sup>

If only one partner submits, and does not profess to be acting on behalf of his copartner, the copartner will not be bound,

*v. Curry*, 19 Johns. 137; *Steiglitz v. Egginton*, Holt, 141; 8 Serg. & Lowb. 54; *McBride v. Hagan*, 1 Wend. 326. In the following cases the negation of the power appears to be in general terms: *Karthauss v. Ferrer*, 1 Pet. 222 (the instrument in this case was a bond); *Martin v. Thrasher*, 40 Vt. 460; *Wood v. Shepherd*, 2 P. & H. (Va.) 442; *Buchoz v. Grandpan*, 1 Mich. 367; *Harrington v. Higham*, 13 Barb. 660; *Jones v. Bailey*, 5 Cal. 345; *Strangford v. Green*, 2 Mod. 228; — *Stead v. Salt*, 3 Bingh. 101; *Burnell v. Minot*, 4 Moore, 340. Some Massachusetts cases are also sometimes cited though they are hardly in point; *Abbott v. Dexter*, 6 Cush. 108; *Wesson v. Newton*, 10 id. 114; *Horton v. Wilde*, 8 Gray, 425. The cases which give the power to one partner to bind the others, generally expressly limit that power to submissions not under seal; they are as follows: *Taylor v. Coryell*, 12 Serg. & R. 243; *Hallack v. March*, 25 Ill. 48; *Southard v. Steele*, 3 Monroe, (Ky.) 435; and *obiter* in *Buchanan v. Curry*, 19 Johns. 137; *Wilcox v. Singletary*, Wright, (Ohio) 420.

<sup>1</sup> *Mackay v. Bloodgood*, 9 Johns. 285; *Russell on Arb.* 20; and by implication, *McBride v. Hagan*, 1 Wend. 326.

<sup>2</sup> *Eastman v. Burleigh*, 2 N. H. 484; *Mackay v. Bloodgood*, 9 Johns. 285.

<sup>3</sup> *Martin v. Thrasher*, 40 Vt. 460.

though the subject-matter of the submission was business of the firm.<sup>1</sup>

But there is a state of affairs in which a partner who is neither a party to the submission nor bound by either the submission or the award, may yet become concluded by the fulfilment of the award. Thus where the award was of a sum due to the partnership, and the party who was ordered to pay did pay to the signing partner, who thereupon indorsed a receipt and acknowledgment of satisfaction on the back of the award; it was held that the non-signing partner was bound, not indeed, by either the submission or the award, but by the "compromise or liquidation of the claim, which the one partner might make for the firm, and which was not invalidated by the fact that it had been brought about through the intervention of arbitrators. The receipt operated as a release or as an accord and satisfaction."<sup>2</sup>

If one partner submits for himself and his copartner, he himself will be personally bound by the award, equally whether his copartner be bound or not.<sup>3</sup> In such case if the copartner refuses to comply with the requirements of the award, his refusal or omission is a breach for which the submitting partner will be liable.<sup>4</sup>

Where two partners are the party of the one part, to a submission, an award against only one of them is justifiable.<sup>5</sup>

It has been held in England that if, on dissolution of the partnership, one partner authorizes the other to collect the assets and to sue in their joint names, yet this would not empower the acting partner to refer to arbitration a suit brought by him under this authority; for though a court of equity would oblige the retiring partner to allow his name to be used

<sup>1</sup> *Hutchins v. Johnson*, 12 Conn. 376.

<sup>2</sup> *Buchanan v. Curry*, 19 Johns. 137.

<sup>3</sup> *Strangford v. Green*, 2 Mod. 228; *Harrington v. Higham*, 13 Barb. 660; *Karthus v. Ferrer*, 1 Pet. 222; *McBride v. Hagan*, 1 Wend. 326; *Russell on Arb.* 20; *Wood v. Shepherd*, 2 P. & H. (Va.) 442; *Jones v. Bailey*, 5 Cal. 345.

<sup>4</sup> *Russell on Arb.* 20.

<sup>5</sup> *Dater v. Wellington*, 1 Hill, (N. Y.) 319.

in suing, yet he could not be forced to submit to arbitration.<sup>1</sup> But in the United States it must be regarded as doubtful whether this ruling would be sustained; for it has been held in our courts that power to conduct a suit includes power to agree to refer it by rule of court, such being one of the familiar and established processes of litigation.<sup>2</sup>

**Agents.**— If a submission is to be entered into through the intervention of an agent, it is only a reasonable precaution to confer upon the agent his authority to submit, by a written instrument. By this means alone can the danger that his action will be questioned by his real or supposed principal be avoided. The instrument, like any other power of attorney, must be of at least as high a dignity as the submission which he is empowered to execute; *e. g.* if the submission is to be by specialty the power should be under seal. But if the submission be needlessly executed under seal and would have been equally valid without the seal it will be binding although the authority was conferred by an unsealed instrument.<sup>3</sup>

When one person is acting as agent for another in a general way, but in regard only to certain matters, it is often a difficult and delicate question in the absence of a written and duly executed authority, to determine whether or not it is within the scope of his agency to refer to arbitration points in doubt, controversy or litigation arising out of these matters. There seem to be no threads of general principle upon which the various cases can be separated. The only satisfactory process for exhausting the adjudicated law upon the subject would appear to be by a classified abstract of the decisions, which fortunately are not so numerous but that this plan may be considered feasible. The topic can be conveniently divided into three parts: 1. Instances in which the principals have been

<sup>1</sup> *Hatton v. Royle*, 3 Hurlst. & N. 500; *Russell on Arb.* 20.

<sup>2</sup> See *post*, in this chapter, the division on "*Agents.*" *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396. See *Wilks v. Back*, 2 East, 142.

<sup>3</sup> *Wood v. Auburn & Rochester R.R. Co.*, 4 Seld. (8 N. Y.) 160; *White v. Fox*, 29 Conn. 570.

declared not bound. 2. Instances in which they have been declared bound either originally or by virtue of circumstances occurring subsequently to the submission. 3. Instances in which the agents have been held to have bound themselves personally.

1. **Principals not bound.** — Authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice; or authority expressed in these words: "If you can honorably and fairly settle with R. for me, out of court, do so; if not, let the court and jury settle," does not empower the agent to submit to arbitration.<sup>1</sup>

Authority to a son, despatched to a distant place, "to settle" matters of account, does not authorize him to submit to arbitration.<sup>2</sup> But an authority to underwrite and to settle losses on a policy of insurance has been held to include a power to refer.<sup>3</sup>

A mere general agent with no specified functions has no authority to submit for his principal.<sup>4</sup>

A general authority to collect or receive payment does not include or carry with it power to submit debts or claims to arbitration.<sup>5</sup> Unless, indeed, such power arises or is to be inferred from general usage, or is given by rule of court.<sup>6</sup> It is not conferred by the words "to sue, ask for, and demand all sums or moneys due me."<sup>7</sup> Mr. Parsons, *loco citato*, says that power to compromise claims does not give power to submit them to arbitration. But the authority which he cites, — *Alexandria Canal Co. v. Swan*, 5 How. (U. S.) 83, — fails to bear out his assertion. Very probably his theory may be

<sup>1</sup> *Scarborough v. Reynolds*, 12 Ala. 252.

<sup>2</sup> *Huber v. Zimmerman*, 21 Ala. 488.

<sup>3</sup> *Goodson v. Brooke*, 4 Campb. 163; *Russell on Arb.* 24.

<sup>4</sup> *Trout v. Emmons*, 29 Ill. 433; *Lowenstein v. McIntosh*, 37 Barb. 251.

<sup>5</sup> *Story on Agency*, § 99; 2 *Parsons on Contracts*, pp. 688, 689; *Caldwell on Arb.* 14, 15, 152, 153; *Goodson v. Brooke*, 4 Campb. 163.

<sup>6</sup> 2 *Parsons on Contracts*, pp. 688, 689, citing *Buckland v. Conway*, 16 Mass. 396; *Henley v. Soper*, 8 Barn. & C. 16.

<sup>7</sup> *Scarborough v. Reynolds*, 12 Ala. 252.

sound law ; yet it is not improbable that an award of money due to the principal and a receipt for that sum in full satisfaction executed by the agent might be held to conclude the parties upon the same principle as that laid down in *Buchanan v. Curry*.<sup>1</sup> There is certainly one case which appears to be in direct contravention of the learned author's position. In *Schoff v. Bloomfield*,<sup>2</sup> it was held that an agent appointed at a town meeting "to compromise" a claim for damages against the town, growing out of the opening of a road across land of A., had power to bind the town by a submission to arbitration on its behalf.

An English case may be well noted in this connection. One of two copartners, retiring from business, gave to the other a power of attorney "to ask, demand, sue for, compound, and receive" debts owing to the partnership, and "to sign, seal, and deliver any deed," &c., whatsoever, necessary to these ends. This was held to authorize the acting partner to agree to a submission on behalf of both ; but whether or not it was so held solely by virtue of the word "compound" is left to conjecture, for the existence of the power seems to have been assumed by both counsel and judges, and the argument and decision turned chiefly on the form of the signature by the attorney.<sup>3</sup>

2. **Principal bound, originally or by subsequent proceedings.**—Power to underwrite for another and to settle losses under the policy carries with it power to submit claims for losses to arbitration.<sup>4</sup>

An agent, appointed by a town "to compromise" a claim against the town for damages, may submit on behalf of the town.<sup>5</sup>

An agent, appointed generally to prosecute or defend a suit,

<sup>1</sup> 19 Johns. 137 ; abstract of case given *ante* in division on "*Partners.*"

<sup>2</sup> 8 Vt. 472.

<sup>3</sup> *Wilks v. Back*, 2 East, 142.

<sup>4</sup> *Russell on Arb.* 24 ; *Goodson v. Brooke*, 4 Campb. 163.

<sup>5</sup> *Schoff v. Bloomfield*, 8 Vt. 472.



has been declared to have power, apparently on the same ground on which like power is extended to counsel, to agree to a reference by rule of court, since that is a legal mode of prosecuting or defending.<sup>1</sup>

A member of a partnership gave to his son a power of attorney to act for him in dissolving the partnership, with power of substitution. It was held that the son could submit to arbitration on behalf of his father.<sup>2</sup>

If submission be made by an agent not thereto duly authorized, and the principal afterward is notified by the arbitrators of the hearing, appears before them without objection and participates in the proceedings, he will be bound by the award.<sup>3</sup> So also where the principal is a corporation,<sup>4</sup> and has, in addition to the above-recited acts, even allowed judgment to be entered on the award.<sup>5</sup>

Where, after submission by an agent not duly authorized thereto, and award made, the principal took an assignment of the award to himself and then assigned it over to a stranger, the court declared his conduct to be a very strong adoption and ratification of the agent's submission.<sup>6</sup>

An agent of a widow entered into a submission on her behalf to determine what annual payment should be made to her for the use of her dower in certain premises, instead of having it set off to her. She afterward received several successive annual payments of the sum awarded. Held, that she was bound by the award so long as there was no default in the annual payments.<sup>7</sup>

An agent entered into a submission concerning land on the part of his principal, a married man, whom he supposed to be

<sup>1</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396.

<sup>2</sup> *Henley v. Soper*, 8 Barn. & C. 16; 2 M. & R. 155; *Russell on Arb.* 24.

<sup>3</sup> *Diedrich v. Richley*, 2 Hill, 271.

<sup>4</sup> *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. 38.

<sup>5</sup> *Detroit v. Jackson*, 1 Dougl. 106.

<sup>6</sup> *Lowenstein v. McIntosh*, 37 Barb. 251.

<sup>7</sup> *Furber v. Chamberlain*, 9 Foster, (29 N. H.) 405.

the owner. He afterward learned that it belonged to the wife of his supposed principal, and thereupon notified the other party, and proposed to change the submission accordingly. The other party, however, said it was not worth while to change the agreement which was good enough, as it was. The wife allowed the proceedings to continue, with full knowledge of them. Held, that the submission was binding upon her and upon the other party to it.<sup>1</sup>

To the like effect is the case of *Isaacs v. Beth Hamedash Society*.<sup>2</sup> A part only of the trustees of the society signed the submission, but the proceedings prior to the award were sanctioned by the presence and participation of all. Held, that the award bound all.

A submission concerning the boundary line of real estate, entered into by the owner, does not bind his subsequent vendee, purchasing without notice.<sup>3</sup>

3. **The Agent personally bound.**—It is obvious that a duly authorized agent entering into a submission on behalf of his principal, will bind only his principal if the agreement be properly drawn.<sup>4</sup> But it may be so drawn that he will bind himself personally; and some cases of this nature have arisen. Thus, if he enters into the submission in his own name, or if he merely describes himself and signs the submission as “A., agent,” he will be personally bound to perform the award.<sup>5</sup>

In England the doctrine of holding the agent personally liable has been carried very far. Russell says: “In general a man is bound by an award which he enters into for another.”<sup>6</sup> Certainly under the decisions great precision would be necessary, and a very distinct recital of the fact that the principal

<sup>1</sup> *Smith v. Sweeny*, 35 N. Y. 291.

<sup>2</sup> 1 Hilt. 469.

<sup>3</sup> *Emery v. Fowler*, 38 Me. 99.

<sup>4</sup> Russell on Arb. 23. Beside the authorities cited here, the cases concerning “Executors and Administrators,” *post*, in this chapter, should be good precedents.

<sup>5</sup> *Winsor v. Griggs*, 5 Cush. (Mass.) 210; *Smith v. Van Nostrand*, 5 Hill, 419.

<sup>6</sup> Russell, p. 21; *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Alsop v. Senior*, 2 Keb. 707; *Shelf v. Bailey*, Com. R. 183.

is to be bound alone and exclusively, or the agent would probably be held. In *Bacon v. Dubarry*, the agreement was between A., of the one part, and B., as attorney for C., of the other part, but it was declared that B. had bound himself, that he had undertaken *for* C., and must make good, or cause to be made good, his undertaking.

Of course if the agent enters into the submission by a bond conditioned that C., the agent, "for and on behalf of said B.," the principal, shall perform the award, it is obvious that the agent has bound himself and cannot escape.<sup>1</sup>

If he undertakes to submit jointly, for himself and on behalf of others, for whom he has no power to submit, and stipulates generally for performance of the award, he will be individually bound by this stipulation, and liable for a breach of it, though by the act of one of the others.<sup>2</sup>

**Incidental Powers of Agent authorized to submit.**—An agent appointed to submit a claim to arbitration is not thereby authorized to ratify and confirm the award.<sup>3</sup> An agent authorized to conduct a reference may consent that the opposing party may produce his books before the arbitrator, alone and on a subsequent day.<sup>4</sup> He may also waive an objection to the appointment of an umpire improperly made by lot.<sup>5</sup>

**Submissions by Counsel in a lis pendens.**—Counsel employed to bring or to defend a cause have power to submit it to arbitration.<sup>6</sup> There is only one case in which this power is denied,

<sup>1</sup> *Cayhill v. Fitzgerald*, 1 Wils. 58.

<sup>2</sup> *Smith v. Van Nostrand*, 5 Hill, 419; *Russell on Arb.* 20.

<sup>3</sup> *Bullitt v. Musgrave*, 3 Gill, 31.

<sup>4</sup> *Hamilton v. Rankin*, 3 De Gex & S. 782; *Russell on Arb.* 24.

<sup>5</sup> *Backhouse v. Taylor*, 20 L. J. Q. B. 233.

<sup>6</sup> 2 *Parsons on Contracts*, pp. 688, 689; *Bates v. Visher*, 2 Cal. 355; *Smith v. Bossard*, 2 McCord's Chanc. 406; *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396; *Scarborough v. Reynolds*, 12 Ala. 252; *Holker v. Parker*, 7 Cranch, 452; *Wade v. Powell*, 31 Geo. 1; *Stokely v. Robinson*, 34 Penn. St. 315; *Somers v. Balabrega*, 1 Dall. 164; *Cahill v. Benn*, 6 Binney, 99; *Beverly v. Stephens*, 17 Ala. 701; *Coleman v. Grubb*, 23 Penn. St. (11 Harris) 393; *Wilson v. Young*, 9 Barr, 101; *Bingham's Trustees v. Guthrie*, 19 Penn. St. (7 Harris) 418; *Russell on Arb.* p. 25 *et seq.*; *Talbot v. McGee*, 4 T. B. Monroe, 377; *Jenkins v. Gillespie*, 10 Sm. & M. 31.

and an examination of the opinion therein shows that it was based upon a gross and unquestionable misconception of the nature of the ruling in the English case of *Bacon v. Dubarry* (1 *Ld. Raym.* 246, *Salk.* 70, *Carth.* 412, *Comb.* 439, *Mod.* 129). There is no chance that this single opposing utterance will suffice to outweigh the mass of contrary authority.<sup>1</sup> An oral agreement of this nature, provided it be made in open court and then and there entered by the clerk, will be good.<sup>2</sup> Mr. Parsons' language, *loc. cit.*, would convey the impression that an attorney might probably be allowed to refer his client's business even before any suit had been instituted, and that it is only in the courts of a few States that the existence of a *lis pendens* has been declared a condition precedent to the accruing of the power. There is slender basis for this distinction. It is true that in only one or two causes have the courts deliberately stated that this limitation exists; but it is true on the other hand that in every American cause in which the power has been upheld, it appears to have been exercised *pendente lite*, and to have been a reference of a cause which the referring counsel had been employed to conduct. It may be that counsel employed to urge or defend a claim can properly refer on behalf of their clients before suit is brought, with the express purpose of avoiding a suit. But no case adjudicated in the courts of the United States can be justly regarded as authority for this extreme position.

An attorney cannot, in Pennsylvania, affect his client's title to real estate by entering into any agreement or submission, whether in a pending cause or not.<sup>3</sup>

A strong inclination has been shown in Pennsylvania to allow counsel to include in their submission, made in a pending cause, matters not in issue in that cause.<sup>4</sup> And the rule

<sup>1</sup> *Haynes v. Wright*, 4 *Hayw.* 64.

<sup>2</sup> *Millar v. Criswell*, 3 *Barr*, 449; *Stokely v. Robinson*, 34 *Penn. St.* 315.

<sup>3</sup> *Naglee v. Ingersoll*, 7 *Penn. St.* 185; *Pearson v. Morrison*, 2 *Serg. & R.* 20; *Huston v. Mitchell*, 14 *id.* 307. See *Gable v. Hain*, 1 *Penn.* 267.

<sup>4</sup> *Bingham's Trustees v. Guthrie*, 19 *Penn. St.* 418.

is imperative that if this, or any other stretch of authority upon the part of counsel in framing the submission, is objected to by the client, objection must be promptly made by him, so soon as the step thus taken becomes known to him, and must be made in the court where the suit is then pending, by application to vacate the submission. Otherwise it cannot be urged for the first time at the hearing upon questions of law in the upper court.<sup>1</sup>

The same rule prevails in England, where attorneys and solicitors have unquestionable power to submit. Some distinctions were at one time made between the powers of solicitors and of counsel in this respect;<sup>2</sup> but these seem now to have been done away with.<sup>3</sup> The English cases seem to furnish some basis for the doctrine that an attorney may even refer a point in dispute before suit has been brought. Whether or not these are to be regarded as constituting fair precedents in the United States must, however, be questioned. The attorney of the family or business firm in Great Britain occupies a position, as towards his client, very different from that which is filled by an American lawyer. The English attorney is often the general and responsible business agent. Nearly all the affairs of persons not themselves actually engaged in business are frequently placed wholly in his hands. He has charge of, and to a great extent control over, the property. Agreements and arrangements concerning it are properly and customarily entered into with him. Occupying this peculiar relationship, he might well be considered empowered to enter into an agreement for arbitration, when a lawyer, engaged only for occasional

<sup>1</sup> Ibid; *Huston v. Mitchell*, 14 Serg. & R. 307; *Miller v. Creswell*, 3 Penn. St. 451; *Babb v. Stromberg*, 14 id. 399.

<sup>2</sup> *Russell on Arb.* 27; *Colwell v. Child*, Ca. in Ch. 86, 1 Chanc. R. 104. See *Furnival v. Bogle*, 4 Russ. 142.

<sup>3</sup> *Russell on Arb.* 25; *Latuche v. Pasherante*, 1 Salk. 86; *Buckle v. Roach*, 1 Chit. 193; *Bodington v. Harris*, 1 Bing. 187; *Jamieson v. Binns*, *In re*, 4 Ad. & E. 945; *Paull v. Paull*, 2 C. & M. 235; *Dowse v. Coxe*, 3 Bing. 20; *Thomas v. Hewes*, 2 C. & M. 519; *Faviell v. Eastern Counties Railway Co.*, 2 Exch. 344; *Mole v. Smith*, 1 Jac. & W. 673; *In re Hobler*, 8 Beav. 101.

specific matters, could not be allowed to assume such an extensive authority.

After a reference has been agreed to *pendente lite*, by the counsel in the cause, the courts manifest extreme unwillingness to go behind the record.<sup>1</sup> In England the rules and practice in this particular are extremely rigid. The action of the counsel or attorney has often been held to be conclusive and final upon the client, who, if he be injured or aggrieved, is left to pursue his remedy at law against his wrong-doing agent.<sup>2</sup> This has been so held where the client had expressly instructed the attorney not to consent to a reference;<sup>3</sup> where the client had not only never assented, but prior to the making of the award had sent to the plaintiff and the arbitrator a protest against the proceedings.<sup>4</sup> The courts of the United States have declared that the client may, within a "proper time," revoke the submission entered into by his attorney.<sup>5</sup> Or he may apply to the court for relief.<sup>6</sup> But he cannot seek it by a writ of error.<sup>7</sup> What is the "proper time" within which revocation must be made has never been declared.

An attorney undertaking to refer on behalf of his client must do so by a formal submission. This may be by writing, by parol, or by consenting to a rule of court. But it is essential that it should be done in some formal way, and that the fact of its having been done should appear on the records of the court or among the papers filed in the case; for "there is no submission where there is no evidence of it." Though the award be signed by the counsel for both parties and recite that there has been a submission, yet this will not suffice.<sup>8</sup>

<sup>1</sup> Alexandria Canal Co. v. Swan, 5 How. (U. S.) 83.

<sup>2</sup> Mole v. Smith, 1 Jac. & W. 673; Furnival v. Bogle, 4 Russ. 142.

<sup>3</sup> Filmer v. Delber, 3 Taunt. 486.

<sup>4</sup> Smith v. Troup, 7 C. B. 757.

<sup>5</sup> Coleman v. Grubb, 28 Penn. St. 393; Wilson v. Young, 9 Barr, 101.

<sup>6</sup> Millar v. Criswell, 3 Barr, 449; Wilson v. Young, 9 id. 101.

<sup>7</sup> Millar v. Criswell, 3 Barr, 449.

<sup>8</sup> Stokely v. Robinson, 34 Penn. St. 315.

Where the submission is made *pendente lite*, and provides that judgment shall be entered on the award "without exception or appeal," this will not make the agreement an excess of authority on the part of the attorney. For such words would not prevent the court from interfering in a suitable case.<sup>1</sup>

A corporation will be bound, like any other client, by the submission of its counsel entered into in a cause, and it is not necessary that there should be any document executed under the corporate seal in order to confer authority upon the counsel.<sup>2</sup>

An attorney's consent to an enlargement of time under a submission binds the client.<sup>3</sup>

The assent of all the members of a firm to a parol submission will be presumed from the fact of the appearance of their attorney for them before the arbitrator, though only one of them requested the arbitrator to act.<sup>4</sup>

**Executors and Administrators.** — At common law an executor or administrator may, in his official capacity, submit to arbitration demands for or against the estate.<sup>5</sup> This rule is said to be based upon the fact that the administrator has power to prosecute or defend suits.<sup>6</sup> The award will be binding against him in his fiduciary capacity,<sup>7</sup> and against the creditors of the estate.<sup>8</sup> The settlement or liquidation thus effected

<sup>1</sup> *Wilson v. Young*, 9 Barr, 101; *Bingham's Trustees v. Guthrie*, 19 Penn. St. (7 Harris) 418.

<sup>2</sup> *Alexandria Canal Co. v. Swan*, 5 How. (U. S.) 83; *Mayor of Ludlow v. Charlton*, Ex. E. T. 1845; *Faviell v. Eastern Counties Railway Co.*, 2 Exch. 344; *Russell on Arb.* 26.

<sup>3</sup> *Russell on Arb.* 26; *Rex v. Hill*, 7 Price, 636.

<sup>4</sup> *Russell on Arb.* 25; *Adams v. Bankart*, 1 Cr. M. & R. 681.

<sup>5</sup> *Russell on Arb.* 29; *Russell v. Lane*, 1 Barb. 519; *Yarborough v. Leggett*, 14 Tex. 677; *Swicard v. Wilson*, 2 Rep. Con. Ct. 218; *Alling v. Munson*, 2 Conn. 691; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Coffin v. Cottle*, 4 Pick. 454; *Bean v. Farnam*, 6 id. 269; *Jones v. Deyer*, 16 Ala. 221; *Merchants' Bank v. Rawls*, 21 Ga. 334; *Overly's Executor v. Overly's Devises*, 1 Metc. (Ky.) 117; *Logsdon v. Roberts' Executors*, 8 Monr. 256.

<sup>6</sup> *Kendall v. Bates*, 35 Me. 357; *Eaton v. Colé*, 1 Fairf. 187; *Weston v. Stewart*, 2 id. 326.

<sup>7</sup> *Wheatley v. Martin's Adm'r*, 6 Leigh, 62.

<sup>8</sup> *Strodes v. Patton*, 1 Brock. 228, per Marshall, C. J.

will be equally good, as against legatees or distributees, as if accomplished in any other manner.<sup>1</sup> A contrary opinion as to the general right to submit has been expressed in Louisiana, where it was said that, although it ought to be conceded that administrators have no right to submit, yet since this prohibition is intended to protect the rights of parties interested, submissions thus made are not absolutely null, and their want of authority may be cured by the ratification or acquiescence of the heirs, distributees, and creditors.<sup>2</sup>

But after award made, though the award will generally bind the estate,<sup>3</sup> yet if it appears that there were items unknown to the executor, and not acted on by the referees, these may be subsequently set up either by the executor himself or by the creditors of the estate, notwithstanding an award of a general balance has been rendered.<sup>4</sup>

It is common in the United States to provide by statute for submissions to arbitration or reference to be made by administrators or executors on behalf of the estate of the deceased. But if persons holding these positions are not protected by legislative provisions, it seems that they incur no inconsiderable personal risk in entering into such agreements. The first ruling in the English courts was that a simple submission, without an express protest or saving clause to the contrary, would be construed as an admission of assets by the administrator or executor. If the award were that he should pay a certain sum, he could not plead *plene administravit* to a suit upon the award, but would be personally liable to pay the amount if there were not sufficient assets of the estate.<sup>5</sup> It was said that he had misled the other party into incurring the expenses of arbitration to no purpose, and that he should have stated the deficiency of assets in the outset, in the same

<sup>1</sup> *Wheatley v. Martin's Adm'r*, 6 Leigh, 62.

<sup>2</sup> *Lattier v. Rachal*, 12 La. An. 695.

<sup>3</sup> *Bean v. Farnam*, 6 Pick. 269.

<sup>4</sup> *Strodes v. Patton*, 1 Brock, 228.

<sup>5</sup> *Barry v. Rush*, 1 Term, 691; *Robson v. —*, 2 Rose, 50; *Russell on Arb.* 30.



way that he would have been obliged to do in a suit at law, had he sought to escape payment of the judgment on this ground.<sup>1</sup> But the harshness of these decisions as against the executor were subsequently modified. The theory at first had been, that the submission was in itself an admission of assets.<sup>2</sup> But afterward it was held, by a slight and very reasonable change, that the question of whether or not there were assets, was included as a part of the submission.<sup>3</sup> Under this view, the matter of the personal liability of the executor was often made to turn upon the language of the award. If this bade a certain sum to be paid by the executor or administrator, it was equivalent to a finding that he had assets, and it bound him accordingly.<sup>4</sup> But if it simply found that a sum was due, the administrator was not held personally liable, for this was not a finding that he had assets.<sup>5</sup> So where the award was that the executor should pay a certain sum out of the assets, it was held that the question of the existence of assets was left open, and he was not personally liable.<sup>6</sup>

Questions of this nature seem to have been of rare occurrence in the United States, perhaps because statutory provisions have generally intervened to protect the executor or administrator. Mr. Parsons, on the strength of the English cases, lays down substantially the English rules, with their more liberal modifications, as above developed.<sup>7</sup> In a suit in New Jersey<sup>8</sup> the administrator bound *himself and his heirs*. He afterward sought to plead *plene administravit*, but it was objected that he had bound himself personally. The court

<sup>1</sup> Riddell v. Sutton, 5 Bingh. 200. And see Executors of Baracliff v. Adm'rs of Griscom Coxe (N. J.), 165.

<sup>2</sup> Russell on Arb. 30; Barry v. Rush, 1 Term, 691.

<sup>3</sup> Russell on Arb. 30; Worthington v. Barlow, 7 Term, 453.

<sup>4</sup> Russell on Arb. 30, and cases above cited. §.

<sup>5</sup> Pearson v. Henry, 5 Term, 6.

<sup>6</sup> Love v. Honeybourne, 4 Dowl. & Ry. 814; Joseph v. Webster, *In re*, 1 Russ. & M. 496; Russell on Arb. 30, 31.

<sup>7</sup> 1 Parsons on Contracts, 191.

<sup>8</sup> McKeen v. Oliphant, 3 Harrison, 442.

held otherwise, saying that the object of the suit was to determine whether or not any thing was due from the estate of the deceased. The administrator bound himself only to abide by this decision, *i. e.*, to admit that any sum which should be found was in fact due. The strict technical rule that a submission was an admission of assets, could not be allowed to prevail over the clear intention of the parties as found upon the face of the submission. But it should be observed that the arbitrators ordered in their award that the administrator should pay the sum named "out of the estate of said deceased." So that under the later English rule the administrator could not have been held personally liable; and, unquestionably, the old rule that the submission is an admission of assets, whatever be the finding of the arbitrators or the form of the award, must be regarded as not only "strict and technical," but also as too antiquated to be now regarded as law before any tribunal.

But in a case in Massachusetts, in discussing whether or not a submission made by one who was a co-executor was made by him in his personal or his official capacity, the court remark: "The defendant [executor], by submitting a claim against the testator's estate, as [an?] estate in the course of administration, would have rendered himself liable to perform the award, although the sum awarded against him might exceed the assets in his hands." It is true that the statement was supported by no authorities, and as an independent ruling it might be regarded as *obiter dictum*. Still it was one of the considerations upon the strength of which the decision of the cause was based.<sup>1</sup>

It has been said in England,<sup>2</sup> and ruled in this country, that if an executor or administrator submits on behalf of the estate, though the estate will be bound by the award, yet if the award be of a less sum than would have been recoverable at law, the

<sup>1</sup> Tallman *v.* Tallman, 5 Pick. 325.

<sup>2</sup> Russell on Arb. 29; Williams on Ex'rs, (Am. ed.) 1533.

executor or administrator will be liable to make up the deficiency. He may be held to account for it to the heirs, or it may be charged as a *devastavit* against him at the settlement of his accounts.<sup>1</sup> The language of Chief Justice Marshall was: "If the award be *glaringly unjust*, I will not say that the executor may not, under certain circumstances, be made personally responsible."<sup>2</sup> But *quære*, whether the application of these remarks must not be confined to cases where the submission is made by virtue of the common-law right? For if there be express statutory provisions permitting an executor or administrator to submit, it seems hardly conceivable that, after complying with them, he should be held personally liable for the decision of the arbitrator.

The executor or administrator should, of course, be properly described as such in the submission; it should be distinctly stated that he submits only on behalf of the estate. It will be wise to add that he does not admit the existence of assets; or to state whether or not the question of assets is to be included in the submission. He should also sign in the ordinary form, *i. e.*, adding the proper terms of official description, to signify that his signature is made by him in his official capacity. Nevertheless if the intent to act only in this character can be clearly gathered from the agreement, it will suffice. If he be described in the body of the instrument as undertaking as administrator or executor, he will not be personally held by reason of his signature being simply his own name without more.<sup>3</sup> And indeed, in a case in which A. had been sued in her capacity as administratrix of B., and she entered into a submission with the plaintiff of "all matters of controversy between us subsisting, now in suit," but did not in the submission describe herself as administratrix and signed it simply with her own name, it was held that parol evidence was admis-

<sup>1</sup> *Bean v. Farnam*, 6 Pick. 269; *Wheatley v. Martin's Adm'r*, 6 Leigh, 62.

<sup>2</sup> *Strodes v. Patton*, 1 Brock. 228.

<sup>3</sup> *Dickey v. Sleeper*, 13 Mass. 244; *Chadbourn v. Chadbourn*, 9 Allen, (Mass.) 173.

sible to show that no other suit was pending between her and this plaintiff, that the controversy heard was that involved in the suit aforesaid; and upon this evidence the submission was upheld as that of A. in her capacity as administratrix.<sup>1</sup>

A statute empowering an executor to enter into a submission with any "creditor or debtor" of the estate, does not authorize him to enter into such an agreement with the widow; for she, as such, is neither a creditor nor a debtor.<sup>2</sup>

A. had demands against the copartnership of B. and C. B. and C. died, C. being the longer liver. D. took out separate administration on their separate estates. In a suit by A. against D. there was reference and an award of a sum due from the estate of C. Held, that although D. acted in different rights, still the parties were the same in all the demands. A. might substantiate his claims against the administrator of the surviving partner, or each partner might have made payments or advances on partnership account, so that A. might have several demands. The submission and award were upheld.<sup>3</sup>

A testator bequeathed to his son A. certain debts due from A. to him, and the bulk of his property to his son B., and named B. and his (the testator's) widow as executor and executrix. Joint letters of administration were issued to them accordingly. Subsequently, the widow still surviving, A. and B. submitted to arbitration "all matters and things whatsoever arising out of the will and estate of [the deceased] and the just and equitable division thereof, as also any promise, agreement, or contract alleged to have been made by the said B. to the said A. touching the settlement of said estate, and all demands between the parties relating thereto." Held, that B. "entered into the submission in his individual capacity, and not in his representative capacity as executor of his father's will."<sup>4</sup>

<sup>1</sup> *Bennett v. Pierce*, 28 Conn. 315.

<sup>2</sup> *Hutchins v. Johnson*, 12 Conn. 376.

<sup>3</sup> *Whitney v. Cook*, 5 Mass. 139.

<sup>4</sup> *Tallman v. Tallman*, 5 Pick. 325.

An administrator has no control over the realty of the deceased, and consequently his submission concerning it, not joined or acquiesced in by the heir, is not binding.<sup>1</sup>

**Guardians.**—A guardian has a general authority to submit on behalf of his infant ward. For the very reason, it has been said, that an infant cannot bind himself to an arbitration, it is right that the power should exist somewhere; and it resides nowhere so properly as with the guardian, who is not guardian *ad litem* merely, but has the general charge of his affairs, and may be supposed to know what is best for his interests. Performance of the award will be a bar to a suit for the same cause of action by the infant on coming of age.<sup>2</sup> But a guardian *ad litem* has no power to submit, even though the submission be made a rule of court. He cannot change the tribunal or the principles of decision.<sup>3</sup>

A parent may submit a claim for damages arising from a physical injury done to his minor child; and if the submission contemplate that the sums due respectively to the infant in compensation for the injury and to the parent in compensation for the loss of services may be blended, an award of a gross sum in full for both these claims will be good.<sup>4</sup>

A guardian or parent may enter into a submission which will bind him personally, that his ward or infant child shall perform the award.<sup>5</sup>

But though a submission entered into by a parent on behalf of a minor child might in itself be upheld as being for the benefit of the infant, yet if the award require something to be

<sup>1</sup> *Bridgham v. Prince*, 33 Me. 174.

<sup>2</sup> *Weed v. Ellis*, 3 Caines, 253; *Bean v. Farnam*, 6 Pick. 269; *Roberts v. Newbold*, Comb. 318; *Goleman v. Turner*, 14 Sm. & M. 118; *McComb v. Turner*, ib. 119; *Strong v. Beroujon*, 18 Ala. 168; *Weston v. Stuart*, 2 Fairf. (Me.) 326.

<sup>3</sup> *Fort v. Battle*, 13 Sm. & M. 133; *Hannum's Heirs v. Wallace*, 9 Humph. 129.

<sup>4</sup> *Beebee v. Trafford, Kirby*, (Conn.) 215.

<sup>5</sup> *Russell on Arb.* 18; *Gill v. Russell*, Freem. 62; *Bowyer v. Blorksidge*, 3 Lev. 17; *Roberts v. Newbold*, Comb. 318.

done by the infant, which he is legally incompetent to do, *e. g.* the execution of a release, that may therefore be bad.<sup>1</sup>

The guardian of a lunatic may submit to arbitration on behalf of the lunatic.<sup>2</sup>

But in England permission of the Court of Chancery must be obtained by the committee of the lunatic, before a valid submission can be made.<sup>3</sup> Though where no committee has been appointed it has been held that the wife can sue in the name of her distracted husband, to recover debts owing to him;<sup>4</sup> and it might be an inference from this that she could refer either the action or the demand, though the latter question has never yet been passed upon.<sup>5</sup>

But a guardian cannot, of course, enter into a submission where his power over the subject-matter is not co-extensive with the terms of the submission, and, consequently, with the possible requirements of the award, *e. g.* where the conveyance of real estate may be called for.<sup>6</sup>

**Husband and Wife — Married Women.** — The questions, 1. In what cases a married woman can bind herself by her own sole submission; and 2. To what extent a husband can bind his wife by his sole submission concerning her property, rights or interests, are not capable of easy solution by the light of the few adjudicated cases. Though in view of the general theory concerning submissions, it ought to be safe to lay down the rule substantially as follows, to wit: The wife may bind herself by her own sole submission in respect of any property in regard to which she has the absolute power of disposal and conveyance by her own independent and individual action; but she may not bind herself otherwise than in respect of such

<sup>1</sup> Russell on Arb. 19; Knight *v.* Stone, W. Jones, 164; Stone *v.* Knight, Latch, 207, Noy, 93.

<sup>2</sup> Weston *v.* Stuart, 2 Fairf. (Me.) 326; Hutchins *v.* Johnson, 12 Conn. 376.

<sup>3</sup> Russell on Arb. 32; Dane *v.* Viscountess Kirkwall, 8 C. & P. 679.

<sup>4</sup> Rock *v.* Slade, 7 Dowl. 22.

<sup>5</sup> Russell on Arb. 32.

<sup>6</sup> Weston *v.* Stuart, 2 Fairf. (Me.) 326. See division, *post*, on "Subject-Matter of Submissions."

property. The husband may bind the wife to any undertaking, provided that he has the power to carry out the possible terms of the award without her joinder or acquiescence ; or provided that the law would enforce such joinder or acquiescence, if it were legally indispensable to the due performance of the award.<sup>1</sup> The phraseology of these rules seems sufficiently broad to include both the antiquated hardship inflicted upon women by the old common law and the statutory liberality of modern times.

By the general rule of the common law the sole submission of a *feme covert* is void. For her husband was entitled to her chattels, real and personal, and to her *choses in action*; nor could she alien her real estate by her own sole deed.<sup>2</sup> But even at common law a married woman could submit concerning her separate property ; and in New York her disability to bind herself by a submission has been removed by statute.<sup>3</sup> Nor does it seem reasonable to doubt that the enactments in the various States, going the length of giving to a married woman the sole ownership, control, and power of conveyance in respect of her personalty, and often the power to conduct business on her own sole and separate behoof, would be construed as, by necessary implication, giving her the appurtenant power to enter into a submission in relation to such personalty or business.<sup>4</sup> Such is the rule in equity in England.<sup>5</sup> But since a wife cannot convey her real estate without the joinder of her husband in the deed, her sole submission of a dispute which might result in her being ordered to make a conveyance, would

<sup>1</sup> *Fort v. Battle*, 13 Sm. & Marsh. 133 ; *Smith v. Ward*, Styles, 351 ; Bac. Ab. Arb. C.

<sup>2</sup> *Russell on Arb.* 15 ; *Palmer v. Davis*, 28 N. Y. 242 ; *Rumsey v. Leek*, 5 Wend. 20 ; *Kyd on Awards*, 35 ; *Miller v. Moore*, 7 Serg. & R. 164. (In this last case the submission concerned real estate.)

<sup>3</sup> *Palmer v. Davis*, 28 N. Y. 242.

<sup>4</sup> By the custom of London a *feme covert* may carry on business as a sole trader, and "it is apprehended," says Russell, that "she might refer disputes respecting her business to arbitration." *Russell on Arb.* 16.

<sup>5</sup> *Russell on Arb.* 16.

properly be held void on the general principle that her power was not co-extensive with her undertaking. But if she join with her husband in a submission of this description, the agreement will be binding.<sup>1</sup>

But even in England and under the rigidity of the ancient doctrine of the common law, some exceptions were allowed to establish themselves. Thus where parties had knowingly and voluntarily entered into submission with a married woman, if the award were in her favor they were held bound by it.<sup>2</sup> And it was held that the wife of one *civiliter mortuus*, as by exile, banishment, &c.,<sup>3</sup> or of a transported felon,<sup>4</sup> might be a party to a submission.

A statute authorizing a married woman "to manage" her own property, real and personal, "as if sole and without the joinder or assent of her husband," has been held to authorize her to enter by herself into a submission as to the amount of damages to which she is entitled by reason of a flowage of lands held by her as her separate property.<sup>5</sup>

In a submission, A. and B., his wife, were parties of the one part, and C. was party of the other part. The submission was of "all demands between said parties, or all demands which either of them has against the other." A. presented no claims in his own individual right. The award was that C. owed nothing to A. and B., "or either of them . . . upon any demands which they or either of them have against" C. It was held to be within the scope of the arbitrators' powers.<sup>6</sup>

Where the submission is by the husband on behalf of the

<sup>1</sup> *Weston v. Stuart*, 2 Fairf. (Me.) 326; an old case. *Emery v. Wase*, 5 Ves. Jr. 846.

<sup>2</sup> *Palmer v. Davis*, 28 N. Y. 242; *In re Warner*, 2 Dowl. & L. 148; *Russell on Arb.* 17.

<sup>3</sup> *Russell on Arb.* 16; *Countess of Portland v. Prodgors*, 2 Vern. 104.

<sup>4</sup> *Russell on Arb.* 16; *Newsome v. Bowyer*, 3 P. Wms. 37; *Sparrow v. Caruthers*, cited in *Marsh v. Hutchinson*, 2 Bos. & P. 226, and in *Lean v. Schutz*, Wm. Bl. 1197; *Carrol v. Blencow*, 4 Esp. 27.

<sup>5</sup> *Duren v. Getchell*, 55 Me. 241.

<sup>6</sup> *French v. Richardson*, 5 Cush. 450.



wife, it has been said that it is a material point if the subject-matter be a demand in favor of the wife, and there be no claim against her, so that the award cannot require her to do any thing.<sup>1</sup>

Since at common law a *feme covert* was generally incompetent to submit, it has been held that the burden of proving an exception, and that she is able to submit in any particular case, will be upon the party seeking to uphold the submission.<sup>2</sup> But, on the other hand, it has been held that where a husband submits in behalf of his wife, the presumption will be in favor of the validity of the submission; and since there are some matters which he might properly submit on her behalf, it must be specifically objected and shown that the matters in question do not fall within this description.<sup>3</sup>

It seems that in England divorce suits may be the subject of a submission.<sup>4</sup>

If the parties really and those nominally in interest be different, the former should properly join in the submission. Thus where an administrator's official bond, running formally to the judge of probate, but in fact for the benefit of other persons interested in the estate, was sued upon in the name of the judge, it was held that he could not agree to a reference. But after the penalty of the bond had been declared forfeited, the indorsers of the writ, being the real parties in interest, might submit, to determine for what sum execution should issue for their benefit.<sup>5</sup> So where there were several parties plaintiff in an ejectment suit, but all save one of them were mere nominal parties, a submission entered into by that one who was the sole party really interested was upheld.<sup>6</sup>

<sup>1</sup> Per Denio, J., in *Palmer v. Davis*, 28 N. Y. 242.

<sup>2</sup> *Rumsey v. Leek*, 5 Wend. 20.

<sup>3</sup> *McComb v. Turner*, 14 Sm. & M. 119.

<sup>4</sup> *Russell on Arb.* 17; *Bateman v. Olivia*, Countess of Ross, 1 Dow, 235; *Soileux v. Herbst*, 2 Bos. & P. 444.

<sup>5</sup> *Thomas v. Leach*, 2 Mass. 152; *Paine v. Ball*, 3 id. 235.

<sup>6</sup> *Griggs v. Seeley*, 8 Ind. 264.

The United States District Attorney, acting under the instruction of the Secretary of War and Solicitor of the Treasury, agreed, on behalf of the United States, to refer a question concerning flowage: *Held*, that he had no authority to do so; that an Act of Congress is necessary to enable any officer to submit controversies concerning rights of the United States.<sup>1</sup>

**Assignees in Bankruptcy.** — At common law, assignees in bankruptcy seem to stand upon substantially the same footing, as regards their power to submit on behalf of the estate, with executors and administrators. They may enter into such an agreement, and thereby bind themselves in their official capacity and the estate. But unless statutory provisions intervene to protect them, it seems that they might be held liable by the creditors to make up any loss to the estate arising from an award less favorable than the result which could have been obtained by the regular process of litigation.<sup>2</sup> Also, unless they protest against such a construction, their submission may be taken as an admission of assets;<sup>3</sup> or, perhaps, of the question whether or not there are assets, so that the award might be so phrased as to bind them personally.

**Bankrupts.** — Submission entered into by the bankrupt may be binding against himself, so that he may become personally liable for costs, if they be awarded against him.<sup>4</sup> But as towards his assignees or the estate, his submission is void.<sup>5</sup> But if the assignees are notified of the pendency of the reference, appear before the arbitrators and adopt the proceedings, they will be bound by the award.<sup>6</sup>

<sup>1</sup> *United States v. Ames*, 1 Wood. & Min. 76.

<sup>2</sup> *Russell on Arb.* 33, 34; 3 *Parsons on Contr.* 471.

<sup>3</sup> *Russell on Arb.* 33; 3 *Parsons on Contr.* 471; *Robson v. —*, 2 *Rose*, 50. See *ante*, "Executors and Administrators."

<sup>4</sup> *Milnes v. Robertson*, 24 L. J. C. P. 29.

<sup>5</sup> 3 *Parsons on Contr.* 471; *Russell on Arb.* 33; *Whiteacre v. Pawlin*, 2 *Vern.* 229; *Ex parte Kemshead*, 1 *Rose*, 149; *Marsh v. Wood*, 9 *Barn. & C.* 659; *Snook v. Hellyer*, 2 *Chitty*, 48; *Andrews v. Palmer*, 4 *B. & Ald.* 250.

<sup>6</sup> *Russell on Arb.* 34; *Dod v. Herring*, 3 *Sim.* 143; s. c. on *App.* 1 *Russ. & M.* 153; *Ex parte Michie*, 1 *Mont., D. & De Gex*, 181; s. c. 9 *L. J. Bank.* 28.

**Persons having a Joint Interest.**—Where several parties are jointly interested in the same matter, one can bind the other by a submission only by virtue of a special authority.<sup>1</sup> For example, where there are numerous distributees of the estate of one deceased, some of them may agree to a submission, and their rights and interests may be conclusively determined as against themselves, by the award, though the rights and interests of the non-signataries cannot be affected.<sup>2</sup>

**Persons bound in Severalty.**—Where there are two or more parties of either part, even though they do not expressly declare that they submit severally, it will be assumed that they do. Consequently an award may be made in respect of questions arising between any one of them singly, and all or any one of the parties of the other part. Thus, if A. and B. of the one part agree to submit matters in controversy between themselves, and C. and D. of the other part, matters between A. singly and C. and D. jointly, between A. and C., between A. and D., between B. singly, and C. and D. jointly, between B. and C., between B. and D., are all included equally with matters between A. and B. jointly and C. and D. jointly.<sup>3</sup> Some of the cases even go so far as to say that controversies between parties of the same part, *e. g.* between A. and B. or between C. and D., may be passed upon; but this has been denied, and probably would not be held to be law at the present day.<sup>4</sup>

Where the parties to the submission bind themselves severally, the agreement will hold good as against such of them as were able to contract and did so with the proper formalities, though as against others it may be void or voidable by reason

<sup>1</sup> *Eastman v. Burleigh*, 2 N. H. 485.

<sup>2</sup> *Smith v. Smith*, 4 Rand. 95; *Boyd's Heirs v. Magruder's Heirs*, 2 Robins. (Va.) 761.

<sup>3</sup> *Fidler v. Cooper*, 19 Wend. 289; *Baspole's Ca.* 8 Coke, 193; *Chapman v. Dalton*, 1 Plowd. 289; *Athelstone v. Moon*, Comyn, 547; *Joyce v. Haines*, Hard. 399; *Libtral v. Field*, 1 Keb. 885; *Cutter v. Whittenmore*, 10 Mass. 442.

<sup>4</sup> *Carter v. Carter*, 1 Vern. 259; 1 Eq. Ca. Ab. 49; also 2 Rep. 289, referred to in *Chapman v. Dalton*, 1 Plowd. 289, but denied to be good law by Brook in his abridgment of the case.

of an incapacity to contract or an informality in execution.<sup>1</sup> An arbitration bond bound A., B., and C. of the one part, jointly and severally, to and with D. of the other part; it was executed only by A. and B., who, after award made, undertook to urge that the bond was invalid by reason of its non-execution by C. But the court held otherwise, in the absence of any testimony going to show that after the signatures of A. and B. had been affixed to it, it had been delivered only as an escrow. For, it was said, A. and B. must be considered as intending to bind themselves for C., and at any rate it was no hardship upon them, for even had C. signed, the whole sum could have been recovered from either one of them singly.<sup>2</sup>

But if parties undertake to submit on behalf of themselves and of others for whom they have no authority to submit, the agreement will be binding on them, and a breach of it, though committed by the others, will be a breach by them so far as to make them liable on their bond or agreement.<sup>3</sup>

A. and B. had disputes with their brother C., growing out of a devise of lands by their father. They agreed to submit, and A. and B. executed each his several bond with C. It was held that this was "*quasi* but one submission by several bonds," and would support a single award to the effect that A. and B. should pay a certain sum to C., and that C. should release to A. and B.

But, on the other hand, a submission will be separated in order to uphold it between two parties who sign, though a third party named in the body of the instrument and intended to be affected by it does not sign. Thus there were two suits pending, the one between A. and B., the other between A., of the one part, and B. and C. of the other. An agreement for the

<sup>1</sup> Dickey v. Sleeper, 13 Mass. 244; Bean v. Newbury, 1 Lev. 139; Comyn's Dig. Arb. D. 2.

<sup>2</sup> Cutter v. Whittemore, 10 Mass. 442. To the same effect is also Keith v. Gore, 1 J. J. Marsh. (Ky.) 8.

<sup>3</sup> Elliott v. Davis, 2 Bos. & P. 338; Mudy v. Osam, Litt. 30.

<sup>4</sup> Hayes v. Hayes, Cro. Car. 433.

submission of both cases was drawn up and executed only by A. and B. But it was held good as between them, at least so far as concerned the case to which they alone were parties.<sup>1</sup> But where the accession of all parties to the submission is the consideration to each to execute it, it is not valid as to some who have signed until all have signed, even though it refers all matters in difference between them or any two of them.<sup>2</sup>

To a bill in equity there were nineteen respondents, of whom three neglected to appear; three appeared, but took no further steps; thirteen appeared, filed answers, and subsequently agreed to submit. Held, that they were bound by their undertaking, since they had entered into it with a knowledge of the non-concurrence of some of their correspondents.<sup>3</sup>

**Parties to a *lis pendens*.** — If a submission be entered into in a pending cause, or if a reference is undertaken to be made by agreement of parties, all persons who are parties of record to the suit must unite, equally whether they are mere nominal parties or really interested.<sup>4</sup> Strangers to the record may, however, be added as parties to the submission or reference, and will be bound by the award.<sup>5</sup> And the court may, under some circumstances, exercise the same powers towards such outside parties at subsequent stages of the proceedings as it is entitled to exercise over the parties to the action, for the purpose of enforcing compliance with the agreement.<sup>6</sup>

**Duress.** — The fact that, at the time of entering into a submission, a party is under arrest under a process sued out in the same matter does not constitute such duress as to avoid

<sup>1</sup> *Summerville v. Painter*, 44 Penn. St. 110.

<sup>2</sup> *Antram v. Chase*, 15 East, 209.

<sup>3</sup> *Smith v. Virgin*, 33 Maine, 148.

<sup>4</sup> *Owen v. Hurd*, 2 Term, 643.

<sup>5</sup> *Hawkins v. Benton*, 2 Dowl. & Low. 465; and 8 Q. B. 479.

<sup>6</sup> *Williams v. Lewis*, 3 Jur. n. s. 1324; 7 El. & Bl. 929.

his agreement for an arbitration. This constitutes neither oppression nor undue advantage; and the arrest, "of itself, could not have been enough to avoid his acts, even had he made a final settlement." <sup>1</sup>

<sup>1</sup> *Shephard v. Watrous*, 3 Caines, 166.

## CHAPTER II.

### THE SUBMISSION.

Submission.

What constitutes a basis for a submission.

Purely ministerial acts are not such basis ; *e. g.* appraisals, valuations, &c.

Other cognate cases.

Matters of recollection.

Contracts to submit, *in pais* and statutory.

Submissions intended to be statutory, but defectively or carelessly framed.

Superfluous formality.

Upholding submissions according to apparent intent.

The presumption is always favorable to validity.

Reference by rule of court and consent of parties.

Manner of submitting, orally or by writing, &c.

Formalities and characteristics of the submission.

What may be the subject-matter of a submission.

1. Disputes of a civil nature only.

2. Dower.

3. Owelty.

4. Ejectment.

5. One item in account.

6. Actions on penal statutes.

7. Questions of pure law.

8. Regulation of future rights.

Submissions concerning real estate.

boundary lines.

nicely construed.

Construction of statutes concerning submissions.

Rules for construing submissions.

Construction of uncertain or indefinite submission.

Written submission is invariable and final.

Submission will not be stretched by forced construction.

Sundry specific cases of construction.

General submission.

Conditional submissions.

When a reference will be construed to have become changed into a submission.

Submission of a " cause."

1. Its extent and operation on the pleadings.

2. Its operation on previous errors.

May be made to include other matters.

Submission of separate actions.

Effect of a submission in a pending cause upon the *status* of the cause.  
upon the right of action.

Making submission a rule of court, and agreeing for entry of judgment on  
award.

References in cross-actions.

Alteration of the submission.

Extension of time for award, named in submission, by new agreement.

Substitution of new arbitrator or referee.

Enlargement of rule of reference.

Suit upon an altered agreement to submit.

Correction of errors in submission.

How long the submission will remain in force.

Stipulations in submission to waive appeal from award.

“to abide by” an award.

**Submission** is the technical designation of that contract by which parties agree to refer matters which are in dispute, difference, or doubt between them, to be finally decided by the award of judges named by the parties and called arbitrators.

**What constitutes a Basis for a Submission.** — To furnish a sufficient basis for entering into a submission, no legal cause of action in favor of either party need exist. That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough.<sup>1</sup> Nor indeed is it necessary that they should have come to the actual point of a dispute; for a matter simply in doubt may be submitted.<sup>2</sup>

**Purely Ministerial Acts are not such Basis; e. g. Appraisals, Valuations, &c.** — This last ruling, however, demands some explanation or qualification. It is only matters inherently doubtful that can constitute the material for a submission. Matters which are doubtful, solely because no pains have been taken to remove the doubt, are not proper to be submitted. There must be, at least, a conceivable possibility of a difference of opinion between the parties. The decision must be arrived at by some use of discretion, by some exercise of the judicial faculty. Thus the sum of a column of figures before they have

<sup>1</sup> Mayo v. Gardner, 4 Jones, Law, 359; Findley v. Ray, 5 id. 125; Keson v. Barclay, 2 Penn. 531.

<sup>2</sup> Brown v. Wheeler, 17 Conn. 345; but see *post*, p. 40.



been added is, in a certain sense of the phrase, in doubt. The number of square feet in a given surface is likewise in doubt till the measurement and calculation has been made. But a doubt of this nature is not of the sort which can be submitted to arbitration. It is more accurately to be described as a *want of knowledge* than as a *doubt*. It is an uncertainty of that description that there is no intrinsic obstacle to a solution, no room for intelligent men to dispute concerning the result obtained from the application of established processes of calculation to known and unquestioned facts. Therefore there is no occasion for calling into play the powers of a judge or arbitrator, since there is nothing to be adjudicated upon. The labor to be performed is purely ministerial in character.

Accordingly where an accountant was to make up the sum shown to be due by certain books of account, though it was stipulated that his finding should be final, it was held that there was no arbitration, because there was no controversy; there was to be only examination and calculation.<sup>1</sup>

Agreement for delivery of logs by A. to B., at a price named per cord, "the timber to be measured by" a third party. The court said that they did not consider the measurer as occupying the position of a referee, in the ordinary sense of that word. "It is true he must, to a certain extent, have exercised his judgment, for it is difficult to suppose a case where that must not be done. But his duty was ministerial rather than judicial in its character. He was to measure a quantity of logs as firewood is usually measured, and to hold that he was invested with the powers of an arbitrator would be to give him a character which, we think, the parties never intended."<sup>2</sup>

In like manner the not unfrequent stipulation that an engineer shall estimate the amount of work done, and compute the

<sup>1</sup> Kelly v. Crawford, 5 Wall. (U. S.) 785; Carr v. Smith, 5 Q. B. 128; Good-year v. Simpson, 15 Mee. & W. 16.

<sup>2</sup> Hale v. Handy, 26 N. H. 206.

price according to the rates named in the contract for its performance, has been declared not to be properly a submission.<sup>1</sup> The task is merely ministerial, calling for no exercise of discretion. A similar reason was asserted as forming part, though a part only, of the foundation for the decision in *Thayer v. Bacon*.<sup>2</sup> Owners of flats, desirous of having their respective lines run so that each might know his boundary, agreed, severally, to employ at their joint expense a surveyor to run the lines and set up marks. The court held that the parties were not conclusively bound by the lines so run, for that the service expected from the surveyor was simply ministerial. But the more essential point in this cause seems to have been that there was no agreement to abide by his lines, nor any explicit submission to arbitration from which such an agreement could be implied.

Other authorities accord to the decision of the measurer a greater force, and make it equivalent to an award, in one respect at least; for they hold it to be binding upon the parties and final, though they construe the extent of his authority very strictly. Thus if a third person is agreed upon to measure the amount of certain work done, the law in Illinois is well settled to be that his measurement will, in the absence of fraud, be conclusive upon the parties. He must necessarily refer to the contract to see how he is to make the measurement, and his estimate, fairly made in accordance with the manner pointed out in the contract, will be binding.<sup>3</sup> But his construction of the contract itself, in respect of its provisions concerning the manner of measuring the work would not be conclusive upon the parties, for that is matter of law, and is not embraced within his authority.<sup>4</sup>

A decision, resembling those in Illinois in some parts, has

<sup>1</sup> *Condon v. Southside R.R. Co.*, 14 Gratt. 302; *Baltimore & Ohio R.R. Co. v. Polly*, ib. 447.

<sup>2</sup> 3 Allen, 163.

<sup>3</sup> *McAvoy v. Long*, 13 Ill. 147; *Canal Trustees v. Lynch*, 5 Gilm. 526.

<sup>4</sup> *McAvoy v. Long*, 13 Ill. 147.

been rendered also in the State of Maine, in the following case : —

A contract provided that “all the work and materials should be inspected by a third person, and made to correspond with the decision of such person as may be selected, in all respects, whose decision shall be final between the parties.” The court said that it was only the work and materials which were to be inspected. There was no intention exhibited to give to the third person selected any power to determine other differences than those which related to the workmanship, and to the fitness and quality of the materials purposed to be used. But inasmuch as a question had arisen whether or not certain labor and materials were required by the written contract to be furnished, and in order to answer this question the legal construction of the contract must be passed upon it, it was declared obvious that this task was beyond the authority of the referee, and must be determined not by him but by a court of law.<sup>1</sup>

A decision, apparently at variance with the ruling in *Brown v. Wheeler* (*ante*, p. 36), and less easily explainable upon any general theory or doctrine, is furnished by a case in the Maine reports. The parties disputant appointed a person “to see whether” certain work had been done according to the requirements of a contract. It was held that there was no arbitration, for that the agreement did not constitute a submission.<sup>2</sup>

A somewhat different class of cases is presented by an agreement for appraisal, in which the determination of the price or value of an article is to be declared by a third party, not in accordance with any immutable established standard, but by the exercise of discretion or opinion. Such agreements have sometimes been declared not to be submissions to an arbitrator.<sup>3</sup> And though these American authorities are entitled to no very great weight, yet there are several English cases to

<sup>1</sup> *Mason v. Bridge*, 14 Maine, 468.

<sup>2</sup> *McKinney v. Page*, 32 Maine, 513.

<sup>3</sup> *Garred v. Macey*, 10 Missouri, 161 ; *Curry v. Lackey*, 35 id. 389.

the like effect, concerning valuations and sums due to contractors for work done.<sup>1</sup> Mr. Russell, in citing these cases, lays down their principle in the following language:—the valuer, &c., “is not an arbitrator, in the proper sense, unless there have been differences between the parties on the point previous to their submitting it to his decision. A decision which precludes differences from arising, instead of settling them after they have arisen, is for many purposes not an award.”<sup>2</sup>

In *Gan v. Gomez*,<sup>3</sup> Senator Seward, delivering his opinion, says: “A distinction is justly made between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is conclusive of nothing as to the rights of the parties except the mere appraisal or statement, and a submission of matters in controversy for the purpose of final determination. A reference of a collateral fact, or the submission of a particular question forming only a link in the chain of evidence, is not calculated to put an end to the controversy; it barely substitutes the judgment of the referee in the place of evidence on that incidental or collateral matter, leaving the controversy open. Such a decision is not an award, and a reference of such a matter is not a submission to arbitration.”

But these adjudications have not gone unquestioned. A contrary position has been laid down by some tribunals, which are certainly of higher authority than are the courts of Missouri. Thus in New Hampshire, in an elaborate opinion,<sup>4</sup> Mr. Justice Bell says: “Though there are cases where it has been

<sup>1</sup> *Leeds v. Burrows*, 12 East, 1; *Collins v. Collins*, 28 L. J. Chy. 184; 26 Beav. 306; *Lee v. Hemingway*, 3 Nev. & M. 860; s. c. 3 L. J. K. B. 124; *Jenkins v. Betham*, 24 L. J. C. P. 94; *Scott v. The Liverpool Corporation*, 28 L. J. Chy. 230.

<sup>2</sup> Russell on Arb. 3d ed. p. 43, pt. I. c. iii. § 1.

<sup>3</sup> 9 Wend. 649.

<sup>4</sup> *Smith v. Boston, Concord & Montreal R.R. Co.*, 36 N. H. 458. See also *Leonard v. House*, 15 Ga. 473, where a contract to build a bridge at such price as it should be “reasonably worth, or the assessed value of the same by J. G. or A. B.” was declared to be a “sort of parol submission to arbitrament and award.”

held that a reference to a third person, to measure materials or work, to judge of their quality, to fix a price, or to make an appraisal, or the like, is not a submission to arbitration, yet it seems to us that every agreement of parties, by which they bind themselves to abide by the decision of an indifferent third person, as to any matter affecting their rights, is a submission to arbitration, and the decision of such party upon the matter thus referred to him is an award. We do not perceive that any difference in the nature or importance of the question submitted, or of the evidence upon which it must be decided, or in the means to be used to arrive at a correct result, can affect in this respect the nature of the proceeding. If the parties have a difference or dispute, however trivial, or upon a matter however simple, and in whatever mode the truth is to be ascertained, and they select an indifferent third person to be the judge between them, and bind themselves to abide his decision, that seems to us a submission to arbitration, and the decision to be an award." So in *New York*, in the case of *Underhill v. Van Cortlandt*,<sup>1</sup> where there was an agreement in a lease for an appraisal to be made at the end of the term. In the Court of Chancery, the person designated to make the appraisal was spoken of as an arbitrator, and his decision was called an award, without any apparent discussion or doubt concerning the propriety of the phraseology. But later, in the Court of Errors, in the same case,<sup>2</sup> the point was directly met by Spencer, C. J., who said: "Notwithstanding the ingenious distinctions made between an appraisement, under an agreement entered into many years before the appraisement takes place, and an ordinary submission to arbitration, I confess that I do not feel the force of those distinctions. It makes no difference when the contract was made. It took its effect from the mutual agreement as to the persons to become the appraisers; and by whatever name they were called, they were

<sup>1</sup> 2 Johns. Chy. 339.

<sup>2</sup> 17 Johns. 405.

substantially arbitrators, with plenary power to decide upon the subject in difference between the parties.”<sup>1</sup>

A submission requiring the value of work to be determined “according to the usual prices,” was construed in New York as merely prescribing the rule of valuation.<sup>2</sup> The question was not, whether or not the proceedings constituted an arbitration. It was not denied that they did so. But the rule of construction is valuable, and has an obvious bearing upon the question now under discussion.

A contract to take certain real estate in payment of a debt at a valuation to be determined by certain appraisers, is not technically a submission to arbitration; though it may be revoked in the same manner in which a submission might be.<sup>3</sup>

**Other Cognate Cases.** — We find also an English case,<sup>4</sup> to the like effect. The action was upon a bond conditioned for A. M.’s due discharge of his duties as clerk, to be ascertained by inspection of his accounts by J. S., and the amount so ascertained to be liquidated damages. Parke, J., held that the determination was an award; and said the case was to be distinguished from that of *Leeds v. Burrows*,<sup>5</sup> where the valuation of property, to settle an account between parties, was held not to require a stamp as an award.<sup>6</sup> So a confession of judgment for “damages to the amount of one shilling besides their costs, to be taxed by the prothonotary as he shall think the plaintiffs entitled,” is a submission to the award of the prothonotary of the amount of costs, and his decision will be final, and not reviewed by the court.<sup>7</sup>

<sup>1</sup> See also *Lauman v. Young*, 31 Penn. St. 306, where such an agreement is called a “prospective submission.”

<sup>2</sup> *Efner v. Shaw*, 2 Wend. 567.

<sup>3</sup> *Rochester v. Whitehouse*, 15 N. H. 468.

<sup>4</sup> *Jebb v. M’Kiernan*, Moody & Malk. 340.

<sup>5</sup> 12 East, 1, note.

<sup>6</sup> The decision of such a referee has been held conclusive. *Oakes v. Moore*, 24 Me. (11 Shepl.) 214; *Branscome v. Rowcliff*, 6 C. B. 523. In the latter case the referee was spoken of as the “so-called arbitrator.”

<sup>7</sup> *Elvin v. Drummond*, 1 Moore & Pa. 88; 4 Bing. 415.

**Matters of Recollection.**—Where the dispute is as to the occurrence or non-occurrence of a fact in the past time, an appeal to the recollection of a person is not to be confounded with a submission to him.<sup>1</sup> Though an agreement to accept his decision might be binding, as an agreement to abide by the oath of a third party has been held binding,<sup>2</sup> yet no undertaking of this description is properly a submission.

**Contracts to submit, in pais and Statutory.**—The contract of submission may be framed either by virtue of the common law, or under the provisions of statutes. The existence of statutes establishing forms and methods of arbitration has been generally held not to abrogate or modify the right of submission according to the common law. The two systems are commonly regarded as collateral and independent; they subsist beside each other, but without interference with each other; and the disputants may choose and follow which they will.<sup>3</sup>

But one important adjudication presents an exception to this rule. The statute "on arbitrations," in the New York Revised Statutes, which in many sections, and especially in the introductory one, is general in its terms, has been held to be "designed and intended to regulate and control, by uniform and definite rules, all arbitrations upon written submissions in this State." This, therefore, apparently amounts to an abrogation of the right to submit by writing, and to be governed in the arbitration following thereupon, by the rules of the common law. The court say: "There are several cases in the reports

<sup>1</sup> *Williams v. Wood*, 1 Dev. 82.

<sup>2</sup> *Delesline v. Greenland*, 1 Day, 458.

<sup>3</sup> *Wells v. Lain*, 15 Wend. 99; *Howard v. Sexton*, 4 Comst. 157; *Logsdon v. Roberts' Ex'rs*, 3 Monr. 255; *Overly's Executors v. Overly's Devises*, 1 Metc. (Ky.) 117; *Winne v. Elderkin*, 1 Chndl. 219; *Byrd v. Odem*, 9 Ala. 755; *Evans v. McKinsey*, Litt. Sel. Ca. 262; *Diedrick v. Richley*, 2 Hill, 271, note; *Lamar v. Nicholson*, 7 Porter, 158; *Conger v. Dean*, 3 Clarke (Iowa), 463; *Fink v. Fink*, 8 id. 313; *Titus v. Scantling*, 4 Blackf. 89; *Brown v. Kincaid*, Wright, 37; *Carson v. Earlywine*, 14 Ind. 256; *Miller v. Goodwin*, 29 id. 46; *Burnside v. Whitney*, 21 N. Y. 148.

in which it has been assumed by the court that the general provisions of the statute were applicable to and controlled the proceedings before arbitrators generally, when acting under written submissions." "Nothing to the contrary of this has been anywhere decided." For *Wells v. Lain* (*supra*) related only to parol submissions; and *Diedrick v. Richley* (*supra*) was before the Revised Statutes were in force.<sup>1</sup> But the case of *Burnside v. Whitney*<sup>2</sup> certainly does not seem to be quite in harmony with Mr. Justice Johnson's views.

**Submissions intended to be Statutory, but defectively or carelessly framed.**—It is laid down as a general rule that where parties undertake to enter into a submission under a statute, they must follow strictly the statutory requirements. Most statutes provide for entry of judgment on the award, and the jurisdiction of the arbitrators to make an award on which judgment can be entered is special, created entirely by the statute, and sustainable only by compliance with the statute.<sup>3</sup> In Pennsylvania, however, a more liberal custom prevails, and substantial compliance with the act has been held sufficient. Thus where a submission did not in terms stipulate that it should be made a rule of court, judgment was nevertheless entered on the award, on the ground that the intention to this effect would be presumed.<sup>4</sup> In New England, though the courts are rigid, as aforesaid, in their abstract rule that the statutory requirements must be strictly complied with, they have shown some degree of liberality in construing precisely what those requirements are. Thus, where the law required the submission to be signed and acknowledged by the parties, and two copartners were parties of the one part, signature by both, but

<sup>1</sup> *Bulson v. Lohnes*, 29 N. Y. 291.

<sup>2</sup> 21 N. Y. 148.

<sup>3</sup> *Abbott v. Dexter*, 6 Cush. 108; *Monosiet v. Post*, 4 Mass. 532; *Barnett v. Peck*, 6 Vt. 456; *Willingham v. Harrell*, 36 Ala. 588; *Halloran v. Bray*, 29 Ga. 422.

<sup>4</sup> *McAdams' Ex'rs v. Stillwell*, 1 Harris, 90; *Buckman v. Davis*, 28 Penn. St. 211.



acknowledgment by only one, was held insufficient;<sup>1</sup> but signature and acknowledgment by one partner purporting to be made for himself and his copartner, had been sustained in an earlier case,<sup>2</sup> and the court were careful to draw a distinction in order not to overrule it. The statute also required a demand, "under the hand" of the party making it, to be annexed to the submission. The court held that he need not subscribe it, but if he had himself embodied his name in the demand in his own handwriting, or had indorsed it on the writ in the action in which the submission was made, it was a sufficient compliance.<sup>3</sup> So in Maine, the declaration in the writ, and the indorsement thereon of the words "from the office of A. and B." (plaintiff's attorneys), were declared a sufficient specification of demand and signature; and counsel having agreed that for the sake of convenience in using it the demand should not be annexed to the submission till the close of the hearing, the informality was disregarded.<sup>4</sup> But when the statute requires the annexation of the demand, it is indispensable that some document capable of being construed as a demand, and under the hand of the party, should appear,<sup>5</sup> save only in the case of a general submission of all demands between the parties; this is exceptional, and requires no attendant specification.<sup>6</sup> But where the submission is only of all demands arising after a certain day, the specification must be annexed.<sup>7</sup>

Under a statute which said that where "all demands" were submitted no specification need be appended, a submission of "all demands on either part, except heirship," was held good without any specification.<sup>8</sup>

A rule requiring the prothonotary to determine the number

<sup>1</sup> *Abbott v. Dexter*, 100 Mass. 108.

<sup>2</sup> *Skillings v. Coolidge*, 14 Mass. 43.

<sup>3</sup> *Humphry v. Strong*, 14 Mass. 262; *Inman v. Wheeler*, 1 Pick. 504.

<sup>4</sup> *Harmon v. Jennings*, 22 Maine, 240; *Wood v. Holden*, 45 id. 374.

<sup>5</sup> *Bullard v. Coolidge*, 3 Mass. 324; *Smith v. Kimball*, 1 N. H. 72.

<sup>6</sup> *Barnett v. Peck*, 6 Vt. 456.

<sup>7</sup> *Pierce v. Pierce*, 30 Maine, 113.

<sup>8</sup> *Kendall v. Bates*, 35 Maine, 357.

of arbitrators, was held to have been sufficiently complied with where each party had respectively chosen one arbitrator and the prothonotary had chosen a third.<sup>1</sup>

A statutory requirement that arbitrators shall seal their award is merely directory. Their apparently accidental neglect to seal it will not invalidate it.<sup>2</sup>

A statutory requirement that all agreements in a pending cause shall be in writing, will not, of necessity, totally avoid an oral agreement to refer.<sup>3</sup>

But all courts have been unanimous in refusing to sustain submissions wherein any substantial deficiency existed. Thus an unacknowledged submission, made under a statute requiring acknowledgment, is void.<sup>4</sup> A seal, if required by statute, has been held to be an indispensable formality.<sup>5</sup> And a submission to one arbitrator, where the statute requires three, was held to be bad.<sup>6</sup> Though where the statute provided for the choice of two arbitrators, and, on their failure to agree, for the choice by them of an umpire, the selection of three, originally made by the parties, to sit at the hearing, was held an immaterial variance.<sup>7</sup>

A submission, pursuing the statute and providing that it may be made a rule of court, is a statutory submission;<sup>8</sup> and so it is if it expressly declare that it is intended to operate under the statute, though it adds a waiver of the right of appeal given by the statute; for parties have a right to waive the original rule and right of appeal without losing the other privileges of the statute.<sup>9</sup> So also they may waive the swear-

<sup>1</sup> *Withers v. Haines*, 2 Barr, 435.

<sup>2</sup> *Price v. Kirby*, 1 Ala. 184.

<sup>3</sup> *Wells v. Lain*, 15 Wend. 99; and see *Bulsom v. Lampman*, 1 Kansas, 324; *contra*, *Smith v. Pollock*, 2 Cal. 92; *McClendon v. Kemp*, 18 La. An. 162; *Raguet v. Carmouche*, 5 id. 133.

<sup>4</sup> *Fink v. Fink*, 8 Clarke (Iowa), 313.

<sup>5</sup> *Hamilton v. Hamilton*, 27 Ill. 158.

<sup>6</sup> *Bowes v. French*, 2 Fairf. (Me.) 182; *Monosiet v. Post*, 4 Mass. 532.

<sup>7</sup> *Forsley v. Galveston, Houston & Henderson R. R. Co.*, 16 Texas, 516.

<sup>8</sup> *Estep v. Larsh*, 16 Ind. 82.

<sup>9</sup> *Wynn v. Bellas*, 34 Penn. St. 160

ing of the arbitrator; the statutory requirement for such swearing is only for the protection of the parties, and is not imperative.<sup>1</sup> But where a submission becomes intrinsically inconsistent, by professing an intention to be governed by the rules of the statute, and at the same time, in some specific particulars, asserting entirely contrary stipulations, the latter, as being the distinctly expressed intention, will prevail.<sup>2</sup>

In statutory submissions, especially if not made in a pending cause, the particularity and technicality of pleading may be dispensed with. The ground and extent of the demand must be fully and clearly set forth; but no more will be required.<sup>3</sup> Demands simply naming an amount are insufficient.<sup>4</sup>

**Superfluous Formality.** — Where the submission, though not required by the statute to be under seal, has nevertheless been signed under seal by an agent, it is not needful that the authority of the agent should also be under seal.<sup>5</sup>

**Upholding Submissions according to Apparent Intent.** — The courts will always seek to uphold a submission, in spite of a defect in formality, *according to the obvious intent of the parties*.<sup>6</sup> Accordingly, where there are two different acts, under the one of which it could be sustained, but under the other of which it could not, it will be assumed to have been made under the former, unless something appears in the instrument itself clearly inconsistent with such an assumption. The parties themselves having practically agreed to waive formalities, cannot afterward seek to stand strictly upon them.<sup>7</sup> In a Michigan case it is said that the courts will always seek to construe the

<sup>1</sup> Howard v. Sexton, 1 Denio, 440; Hill v. Taylor, 15 Wis. 190.

<sup>2</sup> South Carolina R.R. Co. v. Moore, 28 Ga. 398.

<sup>3</sup> Houghton v. Houghton, 37 Me. 72; Tuskaloosa Bridge Co. v. Jemison, 33 Ala. 476; King v. Same, ib. 499; Barnett v. Peck, 6 Vt. 456.

<sup>4</sup> Hayes v. Bennett, 2 N. H. 422; Hill v. Page, 1 id. 190; Jones v. Hacker, 5 Mass. 264.

<sup>5</sup> White v. Fox, 29 Conn. 570.

<sup>6</sup> McAdams' Ex'rs v. Stillwell, 13 Penn. St. 90; Large v. Passmore, 5 Serg. & R. 51; Harris v. Hayes, 6 Binn. 422.

<sup>7</sup> Kimmel v. Shank, 1 Serg. & R. 24; Okison v. Flickinger, 1 Watts & S. 257; Massey v. Thomas, 6 Binn. 333; Bemus v. Quiggle, 7 Watts, 363.

bond as a statutory or as a common-law bond, according to the *apparent* intent of the parties. If it resembles a statutory submission, but was evidently not meant as such, it will be upheld as a common-law submission.<sup>1</sup> Occasionally, where it has seemed to the court that they should thus best carry out the intent of the parties, they have sustained a submission as good at common law, though the purpose had either obviously or apparently been to make it a statutory submission, but the parties had failed to do so through some defect in compliance with the requirements.<sup>2</sup>

But in other cases the courts have refused to uphold defective statutory submissions as good common-law submissions, remarking that the parties should be held to their election,<sup>3</sup> or refusing to "substitute another and a very different contract from that into which [the parties] entered."<sup>4</sup> In another case, the statutory submission, had it only been properly made, would have authorized the entry of judgment, and was obviously designed to do so. The court refused to sustain it at common law, for *non constat* that the parties would have agreed to submit had they not anticipated the benefit of the judgment.<sup>5</sup>

The abstract principle lies in the propriety of carrying out the intent of the parties, and it may be a matter for the discretion of the court in each case to determine how this will be better done, whether by avoiding the invalid statutory submission altogether, or by allowing it to be enforced as a common-law submission. If the latter method would materially affect the relative rights of the parties, it would be obviously improper to adopt it.

**The Presumption is always favorable to Validity.**—The pre-

<sup>1</sup> Clement v. Comstock, 2 Mich. 359.

<sup>2</sup> French v. New, 20 Barb. 481; Tyler v. Dyer, 13 Maine, 41; Benjamin v. Benjamin, 5 Watts & S. 562; Fink v. Fink, 8 Clarke (Iowa), 313. See also Akely v. Akely, cited *post* in "When a Reference will be construed to have become changed into a Submission."

<sup>3</sup> Allen v. Chase, 3 Wis. 249.

<sup>4</sup> Deerfield v. Arms, 20 Pick. 480.

<sup>5</sup> Williams v. Walton, 9 Cal. 142.

sumption is always in favor of the validity and regularity of the would-be statutory submission as such. Thus, the statutory requirement being that the parties should appear in person or by attorney before a magistrate and there sign the submission and acknowledge it, the submission bore the simple signature of each party, but the acknowledgment of one of them was stated to be made by attorney. The court said there was nothing on the face of the papers to show that the name of the party was not also signed by the attorney in the presence of the magistrate, and the submission was upheld.<sup>1</sup>

**Reference by Rule of Court and Consent of Parties.**—A reference by order of court in a pending cause is a statutory proceeding.<sup>2</sup> It differs from a submission, inasmuch as a submission, even if entered into under statutory provisions, is the voluntary private undertaking of the parties. But a submission, stipulating for itself that it shall be made a rule or order of court, and a reference entered into by the voluntary agreement of both parties are so nearly the same thing that they are usually treated as practically identical. Indeed, the language of the courts in rendering their adjudications has nearly always been so lax that the distinctions properly existing between the various descriptions of reference and submission have become hopelessly confused. In England it is matter of course for a judge to grant an order of court, referring a cause, upon the written consent of the attorneys of both parties.<sup>3</sup>

The mere fact that a suit is pending between the parties, does not suffice to authorize the court to make their general submission a rule of court, in the absence of any stipulation to that effect.<sup>4</sup> But in Pennsylvania a simple reference to the

<sup>1</sup> *Wright v. Raddin*, 100 Mass. 319.

<sup>2</sup> But in California, "in the anomalous condition of things," it was the custom of the profession to refer, though there was no statute in existence, and the court said, that after the parties had voluntarily referred according to this custom, it was too late for one of them to claim that it was an arbitration and not a reference, by reason of the non-existence of a statute. *Gunter v. Sanchez*, 1 Cal. 45.

<sup>3</sup> *Russell on Arb.* 3d ed. p. 73.

<sup>4</sup> *Fox v. Eales*, 2 Miles, 169.

pending action, embodied in the submission, without any express stipulation, will authorize the court to make it a rule.<sup>1</sup>

**Manner of Submitting: Orally or by Writing, &c.**—The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts. At common law it may be oral, by writing not under seal, or by writing under seal.<sup>2</sup>

**Oral Submissions.**—Generally an oral agreement will be valid.<sup>3</sup> It was even held in New York that though there was a statutory requirement that all agreements made in any pending cause should be in writing, nevertheless an oral submission would be good, though it could not rank as “a proceeding in the cause.” This ruling was based upon the ground that the statute did not specifically declare that an agreement not in writing should therefore be positively void.<sup>4</sup> But in Louisiana, where the Code requires submissions to be in writing, verbal submissions are declared void.<sup>5</sup>

If the submission embodies undertakings, concerning which it is competent for the parties to contract and bind themselves only by writing, then of course an oral agreement will be void; and if only by writing under seal, then a parol agreement will be void.<sup>6</sup> Thus a parol submission of questions involving the title to or any interest in real estate will be void, under the Statute of Frauds.<sup>7</sup> So also a parol agreement that arbitrators

<sup>1</sup> *McAdam v. Stilwell*, 13 Penn. St. 90; *Ford v. Keen*, ib. 179.

<sup>2</sup> *Titus v. Scantling*, 4 Blackf. 89; *Carson v. Earlywine*, 14 Ind. 256; *Byrd v. Odem*, 9 Ala. 755; and see also the cases cited below in the further discussion of this topic.

<sup>3</sup> *Winne v. Elderkin*, 1 Chandler, (Wis.) 219; *Russell on Arb.* pt. I. c. iii. § 2, p. 51.

<sup>4</sup> *Wells v. Lain*, 15 Wend. 99; *Bulsom v. Lampman*, 1 Kansas, 324; *contra*, *Smith v. Pollock*, 2 Cal. 92.

<sup>5</sup> *McClendon v. Kemp*, 18 La. An. 162; *Raguet v. Carmouche*, 5 id. 133.

<sup>6</sup> *Valentine v. Valentine*, 2 Barb. Ch. 480, and see cases cited below.

<sup>7</sup> *Philbrick v. Preble*, 18 Me. 255; *Walters v. Morgan*, 2 Cox Ch. 369; *McMullen v. Mayo*, 8 Sm. & M. 298; and see *post*, “Submissions concerning Real Estate.”

shall determine concerning the granting of a lease, is void under the same statute.<sup>1</sup>

If the dispute be as to the validity or effect of a sealed instrument, it has been said that the submission must likewise be under seal.<sup>2</sup>

If a writing be necessary to pass the title to the thing in controversy, or to divest or convey the right in dispute, then the submission must be in writing.<sup>3</sup>

A written submission for the purpose of determining a boundary line need not be under seal.<sup>4</sup> And if, under an oral submission concerning a boundary line, an award has been made, and has been actually executed and fulfilled by the parties, it will thereafter be valid and binding.<sup>5</sup> So likewise if it has been long acquiesced in.<sup>6</sup> Such long acquiescence, however, is construed only as operating by way of evidence of the agreement of the parties to accept and execute the award.<sup>7</sup> And an oral submission and award, though they may fail to be conclusive between the parties by reason of this technical insufficiency, may yet be admissible in evidence at a trial of the question before a jury.<sup>8</sup>

A similar principle has been applied to a case of a submission concerning a specialty. The instrument was a note under seal; and the question being simply whether or not it had been paid, and therefore the case being wholly provable by parol evidence, a verbal submission was held good.<sup>9</sup>

<sup>1</sup> *Walters v. Morgan*, 2 Cox Ch. 369; *French v. New*, 20 Barb. 481.

<sup>2</sup> *Logsdon v. Roberts's Ex'rs*, 3 Monr. 255.

<sup>3</sup> *French v. New*, 20 Barb. 481; *Evans v. M'Kinsey*, Litt. Sel. Ca. 262; *Martin v. Chapman*, 1 Ala. 278; *Logsdon v. Roberts's Ex'rs*, 3 Monr. 255; *Smith v. Douglas*, 16 Ill. 34.

<sup>4</sup> *Stewart v. Cass*, 16 Vt. 663.

<sup>5</sup> *Sawyer v. Fellows*, 6 N. H. 107; *Gray v. Berry*, 9 id. 473; *Orr v. Hadley*, 36 id. 575; *Eaton v. Rice*, 8 id. 378; *Furber v. Chamberlain*, 29 id. 405.

<sup>6</sup> *Gove v. Richardson*, 4 Greenl. 327.

<sup>7</sup> *Byam v. Robbins*, 6 Allen, 63.

<sup>8</sup> *Byam v. Robbins*, 6 Allen, 63; *Whitney v. Holmes*, 15 Mass. 152; *Tolman v. Sparhawk*, 5 Metc. (Mass.) 476.

<sup>9</sup> *Shockey's Adm'r v. Glasford*, 6 Dana, 9.

A verbal submission of a claim for dower has been allowed.<sup>1</sup>

The rule was laid down by the older text-writers, and has been asserted in some of the cases, that where matters, not in themselves competent to be submitted by a parol submission, have yet been so submitted in conjunction with other matters which were of an uncertain nature, the submission would be good as to both classes of subject-matter; for the uncertainty would pervade the whole.<sup>2</sup>

**Formalities and Characteristics of the Submission.**—No formality is requisite to the validity of the submission. Provided it expresses clearly the intentions of the parties to submit and to be bound by the award of the arbitrator, it will be binding.<sup>3</sup> It may even be “contained in a clause quite collateral to the main purpose of an agreement,”<sup>4</sup> as for example in the instruments recited in *Jebb v. McKiernan*, and *Elvin v. Drummond*, previously discussed.<sup>5</sup>

It has been said that where the submission is oral, it must be proved that the parties mutually and concurrently agreed to abide by the award; and that in determining whether or not such an agreement was made, it will be for the jury to find what words were actually used, and what meaning was attached to them by the parties, as this may be gathered from the attendant circumstances.<sup>6</sup> But a contrary doctrine has been asserted;<sup>7</sup> and the modern rule of general application must probably be taken to be, that the agreement to submit sufficiently implies an agreement to abide by the award.<sup>8</sup>

<sup>1</sup> *Green v. Ford*, 17 Ark. 586.

<sup>2</sup> *Kyd on Awards*, 52, 53; *French v. New*, 20 Barb. 481; 2 *Cowen & Hill's Notes*, 1025; *Logsdon v. Roberts's Ex'rs*, 3 Monr. 255.

<sup>3</sup> *Brady v. Mayor of Brooklyn*, 1 Barb. 584; *Wilson v. Getty*, 57 Penn. St. 266; *M'Manus v. M'Culloch*, 6 Watts, 357.

<sup>4</sup> *Russell on Arb.* pt. I. c. iii. § 1, p. 42.

<sup>5</sup> *Ante*, p. 42.

<sup>6</sup> *Copeland v. Hall*, 29 Maine, 93; *Houghton v. Houghton*, 37 id. 72.

<sup>7</sup> *Valentine v. Valentine*, 2 Barb. Ch. 430; *Evans v. M'Kinsey*, Litt. Sel. Ca. 262.

<sup>8</sup> *Stewart v. Cass*, 16 Vt. 663; *Wilson v. Getty*, 57 Penn. St. 266; *M'Manus v. M'Culloch*, 6 Watts, 357.



The submission should be certain; *i. e.* should definitely set forth upon what questions the arbitrators are to award; and what, if any, are the limitations upon their power in making up their award. But an uncertain submission may be cured by a certain award.<sup>1</sup>

The submission may take the form of an indenture with mutual covenants, or it may be made by the several bonds of the parties, executed and delivered by each to each or all the rest. If the bonds name any specific sum as penalty, this will not operate as a limitation upon the power of the arbitrators, who may award a larger sum if they see fit. But no larger sum can be recovered in a suit upon the bond.<sup>2</sup> Russell says that it seems to be no objection to the validity of a submission that one party is bound by a sealed and the other by an unsealed instrument; instancing the case of a submission entered into between a private individual, who simply affixed his signature, and a corporation, which affixed the corporate seal.<sup>3</sup>

**What may be the Subject-Matter of a Submission — 1. Disputes of a Civil Nature only.** — All disputes and questions of a civil nature may be the subject-matter of a submission. Matters of an illegal nature, or criminal proceedings instituted against one party at the instigation of the other, cannot be submitted.<sup>4</sup> Though the courts will not open matters which have been closed by a general award, apparently good, on the ground of the admission of an illegal item into the account.<sup>5</sup> If the subject-matter wear a double aspect, both civil and criminal, it may be submitted in the former, but not in the latter. For example, in case of an assault, the claim for damages may be submitted, but the criminal prosecution cannot be.<sup>6</sup> Such is the general rule, though in Pennsylvania a submission of “all

<sup>1</sup> Woodward *v.* Atwater, 3 Clarke, (Iowa) 61.

<sup>2</sup> Russell on Arb. 51; Browes *v.* Bruce, Watson on Awards, 3d ed. 4, note (3).

<sup>3</sup> Russell on Arb. 53; Tomlin *v.* Mayor of Fordwich, 6 N. & M. 594.

<sup>4</sup> Harrington *v.* Brown, 9 Allen, 579.

<sup>5</sup> Wohlenberg *v.* Lageman, 6 Taunt. 250; and see 3 *id.* 461, 2 Bos. & P. 371.

<sup>6</sup> Noble *v.* Peebles, 13 Serg. & R. 319.

business, civil and state, in dispute," has been held to include prosecutions for assault and battery; because these suits "might easily be adjusted with the consent of both parties; and we have an act facilitating the settlement of prosecutions of that nature."<sup>1</sup>

2. **Dower.** — A claim of dower is a proper matter for submission.<sup>2</sup>

3. **Owelry.** — A husband may submit to arbitration his wife's claim to owelry of partition.<sup>3</sup>

4. **Ejectment.** — An ejectment suit may be submitted.<sup>4</sup>

5. **One Item.** — A single item of a long account in dispute or suit may properly be singled out for submission by itself.<sup>5</sup>

6. **Actions on Penal Statutes.** — It has been doubted, in England, whether actions upon penal statutes, by common informers, are competent to be submitted to arbitration.<sup>6</sup>

7. **Questions of Pure Law** may be directly,<sup>7</sup> or incidentally, submitted.<sup>8</sup>

8. **The Regulation of Future Rights** of the parties, which can not as yet be reached by courts of law, may be submitted; such as the laying out of a way to be used by one over land of the other, and other like matters.<sup>9</sup>

**Submissions concerning Real Estate.** — In England, in old times, the right to submit to arbitration disputes concerning real estate, especially where the actual title was in dispute, was regarded with great jealousy. But any doubt concerning the validity of such submissions has been long since entirely

<sup>1</sup> *Noble v. Peebles*, 13 Serg. & R. 319.

<sup>2</sup> *Cox v. Jagger*, 2 Cow. 638; *Green v. Ford*, 17 Ark. 586.

<sup>3</sup> *Strawbridge v. Funstone*, 1 Watts & S. 517.

<sup>4</sup> *McCracken v. Clarke*, 31 Penn. St. 498; *Austin v. Snow's Lessee*, 2 Dall. 157.

<sup>5</sup> *McBride v. Hogan*, 1 Wend. 326.

<sup>6</sup> *Russell on Arb.* 3d ed. p. 4.

<sup>7</sup> *Ching v. Ching*, 6 Ves. Jr. 281; *Young v. Walter*, 9 id. 364; *Matthew v. Davis*, 1 Dowl. n. s. 679.

<sup>8</sup> *Wilkinson v. Page*, 1 Hare, 276; *Price v. Hollis*, 1 M. & S. 105; *Steff v. Andrews*, 2 Madd. 6.

<sup>9</sup> *Allenby v. Proudlock*, 4 Dowl. 54; *Ross v. Clifton*, 9 id. 356; *Boodle v. Davis*, 3 Ad. & E. 200.

dissipated.<sup>1</sup> In the United States few traces of the ancient doctrine are to be found; and there is no question that any dispute whatsoever relating to realty may be submitted to arbitration. The cases are innumerable.<sup>2</sup> Not even a specific submission is now required. A general submission will include all questions relating to realty, equally with questions relating to personalty.<sup>3</sup>

In New York, the statute (2 R. S. p. 541, § 2) declares that no submission to arbitration "shall be made respecting the claim of any person to any estate, in fee or for life, in real estate." A submission and award within the prohibition of this enactment are held to be not merely voidable, but to be absolutely void, and therefore to be incapable of ratification.<sup>4</sup> But the statute is very narrowly construed. It has been held to cover only claims to the legal title; and, therefore, that where this was not denied, but only an equitable title was claimed, — *e. g.* a right to compel a conveyance to the claimant, — the statute did not interfere.<sup>5</sup>

**Boundary Lines.** — Questions concerning boundary lines are often submitted to arbitration.<sup>6</sup>

**Submissions concerning Real Estate are nicely construed.** — It is a rule that the submission of questions involving the title to real estate must be by deed. Yet the courts exercise much nicety in requiring that the precise point of *title* should be

<sup>1</sup> *Knight v. Burton*, 6 Mod. 231; *Johnson v. Wilson*, Willes, 248; *Taylor v. Parry*, 1 Man. & G. 604; *Hunter v. Rice*, 15 East, 100; *Downs v. Cooper*, 2 Q. B. 256; *Doe d. Morris v. Rosser*, 3 East, 15.

<sup>2</sup> *Penniman v. Rodman*, 13 Metc. 382; *Carey v. Wilcox*, 6 N. H. 177; *Page v. Foster*, 7 id. 392; *McMullen v. Mayo*, 8 Sm. & M. 298; *People v. McGinnis*, 1 Parker Crim. Ca. 387; *Jones v. Boston Mill Corporation*, 4 Pick. 507; *Clark v. Burt*, 4 Cush. 396; *Blair v. Wallace*, 21 Cal. 317; *Akely v. Akely*, 16 Vt. 450, and cases cited below in further discussion of this topic.

<sup>3</sup> *Munro v. Alaire*, 2 Caines, 320; *Byers v. Van Deusen*, 5 Wend. 268; *Sellick v. Addams*, 15 Johns. 197; *Penniman v. Rodman*, 13 Metc. (Mass.) 382; *McNear v. Bailey*, 18 Maine, 251.

<sup>4</sup> *Wiles v. Peck*, 26 N. Y. 42.

<sup>5</sup> *Olcott v. Wood*, 14 N. Y. (4 Kern.) 32.

<sup>6</sup> *Page v. Foster*, 7 N. H. 392; *Jones v. Boston Mill Corp.*, 6 Pick. 148, and 4 id. 507.

involved ; otherwise, submissions not under seal are upheld. The following cases will serve for example : Where it is only the price of land that is in dispute ;<sup>1</sup> where the submission was only to settle the location of a particular lot according to the description in a partition deed under which both parties claimed title to respective lots, the lines and location of which they could not agree upon ; the real dispute being as to the situation of, not as to the title to, the lot ;<sup>2</sup> where the defendant had acknowledged that he held in trust for the plaintiff a certain sum of money, then invested in real estate, which he was ready to make over so soon as his demands for disbursements should be adjusted and deducted or paid ;<sup>3</sup> where the amount of damages arising out of a dispute about real estate did not in fact involve the title ;<sup>4</sup> where the demand is for damages for an admitted encumbrance ;<sup>5</sup> or for flowage.<sup>6</sup> Plaintiff had made a road chiefly over land of other persons, relying on the fact that it was a benefit to them, as rendering it probable that they would not close it up, and had agreed to let the defendant, who knew the circumstances, use it upon payment of a compensation, to be determined by arbitrators. The court said, that as regarded far the greater portion of the road, there was no interest in land in dispute, and therefore they should uphold a parol submission.<sup>7</sup> But it seems evident from their language that they strained the strictness of the law in order to meet the substantial justice of the case. So a submission concerning an " interest in " a farm, " or the proceeds thereof," was declared not to be a claim in fee or for life to the realty, and therefore not to fall within the rules concerning the submission of questions about realty.<sup>8</sup>

<sup>1</sup> *Davy's Ex'rs v. Faw*, 7 Cranch, 171.

<sup>2</sup> *Jackson v. Gager*, 5 Cow. 388.

<sup>3</sup> *French v. Richardson*, 5 Cush. 450.

<sup>4</sup> *Carson v. Earlywine*, 14 Ind. 256 ; *Byrd v. Odem*, 9 Ala. 755.

<sup>5</sup> *Snodgrass v. Smith*, 13 Ind. 393.

<sup>6</sup> *Proprietors of Fryeburg Canal v. Frye*, 5 Greenl. 38.

<sup>7</sup> *Mitchell v. Bush*, 7 Cow. 185.

<sup>8</sup> *Palmer v. Davis*, 28 N. Y. (1 Tiff.) 242.

So the fact that a guardian cannot convey land of his ward does not invalidate his agreement to submit the question, whether or not a sufficient and adequate price had been paid for land of his ward previously sold.<sup>1</sup>

A trustee gave to his *cestui* a written acknowledgment, stating that he held in trust for her \$1700, then invested in real estate, and promising to make over the same to her on request, upon condition that she should deduct from such sum all advances or payments which he might make to her. After he had become liable to advance or pay on her account more than \$1700, she presented the writing as a claim against him before arbitrators. Held, that the title to real estate was not involved in the submission.<sup>2</sup>

**Construction of Statutes concerning Submissions.**—The tendency of the courts has at times been to construe with great liberality statutes permitting submissions in certain specified descriptions of cases. Thus the Pennsylvania Act of 1805, called the Defalcation Act, allowed only a reference of accounts; but it was by construction extended to embrace “every other cause of action.”<sup>3</sup> And it was under this act that the submission of the ejectment suit, *Austin v. Snow’s Lessee* (*supra*), was upheld. A statute permitting the submission of all controversies which might be the subject of “civil actions,” has been declared to include matters cognizable only in a Court of Equity.<sup>4</sup> Under a statute authorizing the reference of any disputed “claim,” reference of an equitable claim against the estate of a deceased person has been allowed.<sup>5</sup> But the courts of Pennsylvania, in construing their statute providing for compulsory arbitration, which gives to “either party in any civil suit or action” the power to *compel* a submission or reference

<sup>1</sup> *Weston v. Stuart*, 2 Fairf. (Me.) 326.

<sup>2</sup> *French v. Richardson*, 5 Cush. 450.

<sup>3</sup> *Primer v. Kuhn*, 1 Dall. 452.

<sup>4</sup> *Tomlinson v. Hammond*, 8 Clarke, (Iowa) 40.

<sup>5</sup> *White v. Story*, 43 Barb. 124, citing *Ackermom v. Congdon*, apparently an unreported case.

(Act of 1836, § 8), have said that a suit in equity begun by bill, a case where judgment by default has been opened on terms, an action on a bail bond, and a cause brought to an issue in law by a demurrer, though they fall within the general words of the law are not within its spirit. Arbitration cannot be compelled in these cases under the statute; neither can it be compelled where the defendant by neglecting to make an affidavit of defence has acknowledged that he has no defence, and entitled the plaintiff to claim judgment.<sup>1</sup> But an action on a recognizance of bail for stay of execution may be referred under this same statute.<sup>2</sup>

A statute authorizing the submission of any matter which might be "the subject of a personal action at law, or of a suit in equity," does not authorize the submission of the question: how much the defendant should pay to the plaintiff for the plaintiff's surrender of a lease to him at a future day.<sup>3</sup>

The Court of Massachusetts refused to uphold a reference involving the title to realty, undertaken to be made under a statute which did not in terms exclude such questions, but of which the general phraseology seemed clearly to imply that only questions concerning personalty were intended to be covered by it.<sup>4</sup>

In Maine a statute (R. S. c. 108) provides for the submission of controversies which may be the subject of a personal action, and wherein judgment could be entered up on the award by the court sitting as a Court of Law. It was held that a claim for specific performance of a contract for the purchase of real estate could not be submitted under this statute; though a claim for damages for non-fulfilment of the contract might be submitted.<sup>5</sup>

The Massachusetts statute empowering an executor to refer

<sup>1</sup> 1 Grant's Ca. 191; *Hoffman v. Locke*, 7 Harris, 57.

<sup>2</sup> *Petit v. Wingate*, 25 Penn. St. 74.

<sup>3</sup> *Hubbell v. Bissell*, 13 Gray, 298.

<sup>4</sup> *Fowler v. Bigelow*, 8 Mass. 1.

<sup>5</sup> *Butler v. Mace*, 47 Maine, 423.

claims against the estate, allows him to refer claims of his own, not held by him in his official capacity; but not claims which are held by him in such capacity.<sup>1</sup> The New York statute, 2 R. S. 88, 89, covers all claims, legal or equitable, which the executor or administrator could settle or adjust; for example, unliquidated claims by a surviving partner against the estate of his deceased partner, growing out of partnership transactions.<sup>2</sup>

A Pennsylvania statute, forbidding the appellant from the award of arbitrators to produce at the hearing on appeal any books, papers, or documents which he had withheld from the arbitrators, was construed to apply only to such evidence as he had within his possession at the time of the hearing before the arbitrators and had voluntarily refrained from placing before them.<sup>3</sup>

**Rules for construing Submissions.**—The courts will always seek to put as liberal, large, and comprehensive a construction upon the submission as the apparent intent of the parties to it will admit.<sup>4</sup> Thus a submission of a specific question and “divers other matters” has been regarded as equivalent to a general submission of all questions and controversies between the parties.<sup>5</sup> Submission of a cause pending, “and all other demands, and costs already accrued on or growing out of said suit,” has been construed as a reference of all demands between the parties, on the ground that the words, “all other demands,” were not intended to be limited to such demands only as *grew out of the suit*.<sup>6</sup> Pending an injunction suit for the abatement of a livery stable, a submission was made which

<sup>1</sup> *Dana v. Prescott*, 1 Mass. 200.

<sup>2</sup> *Francisco v. Fitch*, 25 Barb. 130.

<sup>3</sup> *Estanson v. Dupuy*, 2 Browne, 100; *Brisbane v. Mitchell*, 8 Serg. & R. 423.

<sup>4</sup> *Orcutt v. Butler*, 42 Me. 83; *Ross v. Watt*, 16 Ill. 99; *Graham v. Graham*, 9 Penn. St. 254; *Noble v. Peebles*, 13 Serg. & R. 319; *Hopson v. Doolittle*, 13 Conn. 236; *Shockey's Adm'r v. Glasford*, 6 Dana, 9; *Estep v. Larsh*, 21 Ind. 190; *Gerrish v. Ayres*, 3 Scam. 245. But see *Scott v. Barnes*, *post*.

<sup>5</sup> *Munro v. Alaire*, 2 Caines, 320.

<sup>6</sup> *Harmon v. Jennings*, 22 Maine, 240.

stipulated that the award should "terminate and for ever decide all matters of controversy, at law or in equity, in relation to said livery stable." It was held, that though the bond given in the injunction suit was not really a part of the subject-matter of the submission, and was not mentioned in the award, it was yet so far substantially included that suit upon it could not be subsequently maintained.<sup>1</sup> A submission recited the existence of a controversy as to "the settlement of the accounts between the parties, and the claims of each upon the other." It was held to include a claim for damages arising from an eviction of one of the parties from demised premises, and for conversion of personal property; inasmuch as it appeared that both these and the other claims between the parties arose out of a written agreement as to the occupation of the premises and cultivation of plants thereon.<sup>2</sup> A submission to arbitrators to settle copartnership affairs, as between the partners, includes the power to say what is and what is not copartnership property.<sup>3</sup> A controversy about a road or path may be taken to include a claim to the soil, as being within the ordinary meaning of the phrase or word in common parlance.<sup>4</sup>

In a submission for the settlement of accounts, and of the *claims* of each party upon the other, it appeared that there were disputes concerning the ownership of certain chattels which might be regarded either as claims in account for the value or the proceeds of the property, or as a charge of a tortious conversion. Held, that they should be regarded in the former light, and therefore regarded as included within the submission.<sup>5</sup>

Submission of "a claim" involves both the legality and the amount of the claim.<sup>6</sup>

A submission of pending actions to referees stipulated that

<sup>1</sup> *Jesse v. Cater*, 28 Ala. 475.

<sup>2</sup> *Owen v. Boerum*, 23 Barb. 187.

<sup>3</sup> *Masters v. Gardner*, 5 Jones, (Law) 298.

<sup>4</sup> *Munro v. Alaire*, 2 Caines, 320.

<sup>5</sup> *Owen v. Boerum*, 23 Barb. 187.

<sup>6</sup> *Colcord v. Fletcher*, 50 Maine, 398.



they should determine how much, if at all, a dam should be cut down, and directed that the cutting down should be done "under their direction." It was held that it was not necessary that they should actually supervise the reduction of the dam to the level they should determine upon; but that their award, accurately establishing this level, would be sufficient, and the alteration should be subsequently made by the sheriff in the customary manner provided by statute.<sup>1</sup>

In construing the extent of the subject-matter of a submission, all documents recited or referred to in the submission, and laid before the referees or arbitrators, should be taken into consideration.<sup>2</sup>

**Construction of Uncertain or Indefinite Submission.**—Where the submission is by no means so definite or certain as it should be, yet if the deficiency can be easily and surely supplied, the courts will seek to uphold it. For example, a submission mentioned that a case was pending between the parties, and referred "said case." The papers in a certain cause showed that it was pending between these parties at the date of the submission. In the absence of any proof of the pendency of any other cause, the submission was upheld as relating to this one.<sup>3</sup> Again, "a matter in difference between the parties" was submitted; the court said, that after they had litigated such a matter before the arbitrators without objection, and an award had been made, it was too late for either of them to object to the submission on the ground of its uncertainty; but some doubt was expressed as to what might have been the effect of the indefiniteness had the objection been taken at an earlier stage.<sup>4</sup> Submission of "difficulties existing between [the parties] in relation to the said Columbus Bridge" was held sufficiently certain.<sup>5</sup> But submission of a controversy

<sup>1</sup> *Berkshire Woollen Co. v. Day*, 12 Cush. 128.

<sup>2</sup> *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 399.

<sup>3</sup> *Rixford v. Nye*, 20 Vt. 182.

<sup>4</sup> *Price v. White*, 27 Mis. (6 Jones) 275.

<sup>5</sup> *King v. Jennison*, 33 Ala. 499.

relating to "a certain piece of land in M. County" was held void for uncertainty, as furnishing no means for identifying the land, and making the award a bar to a subsequent action for the same cause.<sup>1</sup>

From the following case it would seem also that we might devise a rule substantially as follows: That where a submission is so worded as to leave its extent ambiguous, and to create a doubt whether a certain matter or class of matters were included in it, the conduct of the parties at the hearing before the arbitrators may be looked to for elucidation. If such matter or matters have been presented by one without objection by the other, if evidence has been offered upon them, and they have been considered in argument, it will be assumed that they fall within the scope of the submission. But if they have been wholly omitted in the proceedings, a contrary presumption would prevail.

A bond of indemnity between the parties was in force at the date of their entering into a submission of "all demands." Some obligations to pay under this bond had already accrued; others might be anticipated as probably to fall due in the future. These latter were of such a nature that the court considered that they could be estimated by experts with considerable accuracy. The question was, whether or not an award could operate as a bar in respect of obligations to fall due under the bond after the date of the arbitration. The arbitrators had in fact estimated, considered, and allowed for such future claims. The court said that "under this ambiguity the parties themselves could best judge of their own intentions. By their advice, or guided by the circumstances of the case, which indicated a desire that every thing existing between the parties should be finally adjusted, the referees proceeded to adjust all the damages which had arisen, and which could arise under the bond; the parties were heard as to all; the award embraced all; judgment was entered upon it as to all; and now, if the

<sup>1</sup> Woodward v. Atwater, 3 Clarke, (Iowa) 61.

plaintiffs are not estopped as to all, they may recover twice for the same subject-matter.”<sup>1</sup> Accordingly the award was sustained as a bar.

A submission, which is in itself void, may be considered in connection with the subsequent acts of the parties, and by this means may sometimes be upheld. Thus, where a written submission, calling for an *award*, was made to a justice of the peace or to a jury, if either party should demand one, the parties proceeded before a jury of six men, presided over by the justice. In some respects the process appeared judicial; in others it resembled an arbitration. The submission, so far as it provided for a hearing before a jury, was so indefinite that it could not have been enforced, and *per se* was bad. But it was held that it should be considered in connection with the subsequent action of the parties and with the award. Evidence was admissible on behalf of each party, to show either that it was an arbitration or that it was a judicial proceeding; and it would be construed as the one or the other, according to the preponderance of the testimony thus introduced and derived from the award and the proceedings.<sup>2</sup>

**A Written Submission is unvariable and final.** — A written submission cannot be varied by parol evidence. Neither is it competent to show, by parol evidence, what the written submission in fact was.<sup>3</sup> In this respect the general law concerning contracts applies without modification.

A memorandum of an agreement to refer is wholly superseded by a subsequent completed reference or submission.<sup>4</sup> And a verbal agreement, made prior to, or contemporaneously with, a written submission, is merged in the latter.<sup>5</sup>

<sup>1</sup> Cheshire Bank v. Robinson, 2 N. H. 126.

<sup>2</sup> Hays v. Hays, 23 Wend. 363.

<sup>3</sup> Efner v. Shaw, 2 Wend. 567; McNear v. Bailey, 18 Maine, 251; De Long v. Stanton, 9 Johns. 38.

<sup>4</sup> Billington v. Sprague, 22 Maine, 34.

<sup>5</sup> Loring v. Alden, 3 Metc. (Mass.) 576; Symonds v. Mayo, 10 Cush. 39; Palmer v. Green, 6 Conn. 14.

**Submission will not be stretched by Forced Construction.**— Though the courts wish to have a submission and award terminate as many disputes as are reasonably and rightly within their scope, still disputes obviously not included, though so cognate that their annexation would have been highly natural and proper, will not be added by a forced construction. As, where a submission recited that A. had claims against his father's estate, and that the parties, "desirous of closing the matter," referred "all matters in controversy," it was held that only the matter specified was referred, that counter claims of the executor against A. were not included.<sup>1</sup> And a submission of all claims includes only such claims as exist between the parties *directly*. A contingent interest which one of them has in a demand by a third person against the other is not embraced.<sup>2</sup> So also under a submission of "disputes" growing out of partnership dealings and accounts, the court held that the arbitrators could not take into consideration payments made by one of the partners on partnership account subsequent to the submission; for these were not "in truth, subjects of dispute."<sup>3</sup>

A submission of whether or not the owners of a saw-mill had a right to flow land of A. *without* paying him any compensation; and if not, then what sum they should pay to him annually, does not include the independent question, whether or not they had the right to flow the land upon paying a compensation.<sup>4</sup>

An order of court appointing a referee to "take proof concerning a confession of judgment, . . . the judgment roll, . . . and whether the same were actually filed in the clerk's office, cannot be extended to include the question whether or not the judgment had been satisfied in whole or in part.<sup>5</sup>

<sup>1</sup> Scott v. Barnes, 7 Barr, 134.

<sup>2</sup> Adams v. Adams, 8 N. H. 82.

<sup>3</sup> Graham v. Graham, 9 Penn. St. (Barr) 254.

<sup>4</sup> Hopson v. Doolittle, 13 Conn. 36.

<sup>5</sup> Solomon v. Maguire, 29 Cal. 227.

Submission as to what sum annually should be paid to a widow, instead of having dower assigned to her, intends that a sum should be named which should be paid annually, not in lieu or discharge of her right of dower, but in the nature of rent for its use.<sup>1</sup>

A. and B., each claiming the exclusive right to purchase certain land, agreed in writing that it should be bid in by a third party, each furnishing half the purchase-money, and that it should thereafter be conveyed to the one or other of them as should be awarded by five disinterested citizens. Held, that this could not be construed as a submission for a division of the land between them, but to determine which should take the whole of it.<sup>2</sup>

**Sundry Specific Cases of Construction.**—Where the same paper contains an agreement to refer and an agreement to enter an amicable action, the several agreements will be taken in their appropriate order; the case will be entered, and then the reference made.<sup>3</sup>

Where a submission and a note both bore date on the same day, and it did not appear which was of prior execution,—the submission being of all debts, &c., “heretofore existing between the parties,” and the note being payable in specific articles at a day future,—it was held that the note should not be considered as included in the submission.<sup>4</sup>

**General Submission.**—A general submission includes all questions, as well of law as of fact, all questions affecting the civil rights of the parties *inter sese*, and all demands between them, whether legal or equitable, whether relating to personalty or to realty; <sup>5</sup> and demands growing out of allegations of fraud.<sup>6</sup>

<sup>1</sup> *Furber v. Chamberlain*, 29 N. H. 405.

<sup>2</sup> *Irvine v. Marshall*, 7 Minn. 286.

<sup>3</sup> *Massey v. Thomas*, 6 Binn. 333.

<sup>4</sup> *Bixby v. Whitney*, 5 Greenl. 192.

<sup>5</sup> *Merritt v. Merritt*, 11 Ill. 565; *Indiana Central R.R. Co. v. Bradley*, 7 id: 49; *Munro v. Alaire*, 2 Caines, 320; *Byers v. Van Deusen*, 5 Wend. 268; *Sellick v. Addams*, 15 Johns. 197.

<sup>6</sup> *De Long v. Stanton*, 9 Johns. 38.

It will be construed as widely and sweepingly as is possible, without manifestly thwarting the obvious intent of the parties, for the useful purpose of closing all controversies, and disposing of all rights of action.<sup>1</sup> But it covers only matters in dispute, doubt, or controversy between the parties at the date of its execution,<sup>2</sup> and only such demands as exist between the parties *directly*.<sup>3</sup>

A submission general in terms cannot be limited to matters forming the subject of what amounts to an actual dispute;<sup>4</sup> neither, on the other hand, can a submission of "all controversies" be stretched to include matters of business or indebtedness between the parties which are not in dispute.<sup>5</sup> But a submission of matters in dispute will not, unless the intent be evident from the instrument or proved *aliunde*, be so construed as to open matters formerly in dispute, but which have since been settled. Thus, where the language of a bond was ambiguous, and might be construed to refer disputes as to both a paternal and a maternal succession, but the former had been long since apparently finally disposed of, it was held that without other extrinsic and more satisfactory evidence that such was the intent of the parties, it would not be presumed that they had intended to open the matter of the paternal succession.<sup>6</sup>

A non-negotiable note, assigned for value with notice, may be properly included in a submission, entered into between the assignee and the maker, of "all matters, claims, and demands, either at law or equity." Payments and set-offs, made or accruing before notice, are to be allowed to the maker.<sup>7</sup>

A submission of all matters in dispute does not operate to

<sup>1</sup> *Barker v. Belknap's Estate*, 39 Vt. 168; *Woods v. Page*, 37 id. 252; *Orcutt v. Butler*, 42 Maine, 83.

<sup>2</sup> *Thrasher v. Haynes*, 2 N. H. 429.

<sup>3</sup> *Adams v. Adams*, 8 N. H. 82.

<sup>4</sup> *De Long v. Stanton*, 9 Johns. 38.

<sup>5</sup> *Robinson v. Morse*, 29 Vt. 404.

<sup>6</sup> *Calvert v. Carter*, 18 Md. 73; *Carter v. Calvert*, 4 Md. Chy. 199.

<sup>7</sup> *Brown v. Leavitt*, 26 Maine, 251.

revive a claim barred by the Statute of Limitations. Such a demand cannot properly be presented or allowed, unless it be specifically named in the submission, or its admission is expressly assented to by both parties at the hearing.<sup>1</sup> But it seems that the submission of a specific matter would suffice to take it out of the statute.<sup>2</sup>

**Conditional Submissions.** — If a submission be based upon the fulfilment of an agreement, in such a way that the fulfilment is practically made a condition precedent to the taking effect of the submission, a substantial fulfilment will be held sufficient.<sup>3</sup>

Cases where the submission itself contains a condition to be complied with by the arbitrators before the award can be valid, are considered in connection with awards.

An order of court that an action be referred upon the condition that the plaintiff's attorney first enter into a specified stipulation, becomes valid and operative after he has entered into the stipulation.<sup>4</sup>

The parties in a pending cause agreed to refer certain specified items to C., and that either of them might have judgment entered upon his finding, such judgment, when perfected, to be a bar to further proceedings in the suit; until such perfecting, it was stipulated that this agreement should not interfere with the suit; and if the suit should be conducted to judgment pending the agreement, then the agreement should become null and void; also, that the agreement should not be construed as an arbitration or discontinuance of the action, but only as an effort in good faith to settle, and as binding in honor upon both parties, but without prejudice to the legal rights of either. The court held that this constituted a conditional submission to arbitration.<sup>5</sup>

**When a Reference will be construed to have become changed**

<sup>1</sup> *Adams v. Adams*, 8 N. H. 82.

<sup>2</sup> *Adm'r of Colkins v. Partner of Thackston*, Cam. & N. Conf. Rep. (N. Car.) 93.

<sup>3</sup> *Inhabitants of Boston v. Brazer*, 11 Mass. 447.

<sup>4</sup> *People v. McGinnis*, 1 Parker Crim. Ca. 387.

<sup>5</sup> *Merritt v. Thompson*, 27 N. Y. 225.

into a *Submission*.—The matter of when a reference will be construed to have been changed by circumstances into a submission, has been discussed in several New York cases. If the parties voluntarily depart from the regulations of the statute concerning references, their undertaking will be treated as a submission to arbitration.<sup>1</sup> So where the reference is entered into and the referees are chosen simply by consent of parties, without taking out the statutory rule of court, the court, having no control over referees so chosen, will leave the parties to the same remedies which they would be entitled to in the case of an ordinary submission to arbitration, neither rendering judgment on the report nor setting it aside,<sup>2</sup> nor entertaining a motion to review the report.<sup>3</sup> Where the parties have undertaken to refer a cause of a nature not referrible under the statute, it has been said that the proceedings will be a mere arbitration, subject to the ordinary rules governing arbitration and award.<sup>4</sup> But it has also been said that, if such reference was by consent of parties, the report will be sustained as such, and cannot be afterward sued on by either as an award.<sup>5</sup> If such improper reference was made in spite of the objection of one of the parties, the objector will be entitled to have the rule subsequently vacated.<sup>6</sup> And where the action referred is a *species* of action in which reference is proper, though the particular case is not such as the court would refer, yet if the parties consented to the reference, the report will be sustained as such.<sup>7</sup> If the action has been sent to referees in the expectation that there will be an examination of a long account, the reference will not become an arbitration because it after-

<sup>1</sup> *Dodge v. Waterbury*, 8 Conn. 136.

<sup>2</sup> *Cranston v. Kenny's Executors*, 9 Johns. 212; *Miller v. Vaughan*, 1 Johns. 315; *Stevenson v. Beecker*, ib. 492; *Blunt v. Whitney*, 3 Sandf. 4.

<sup>3</sup> *Beardsley v. Dygert*, 3 Denio, 380; *Silmser v. Redfield*, 19 Wend. 21.

<sup>4</sup> *Diedrick v. Richley*, 2 Hill, 271; *Johnson v. Parmely*, 17 Johns. 129; *Green v. Patchen*, 13 Wend. 293.

<sup>5</sup> *Harris v. Bradshaw*, 18 Johns. 26.

<sup>6</sup> *Thomas v. Reab*, 6 Wend. 503.

<sup>7</sup> *Armstrong v. Percy*, 5 Wend. 535.



ward turns out that no such examination is necessary. A party who has requested or consented to a reference cannot oppose the entry of judgment on the report for the reason that the cause did not, as it was developed, furnish a proper case for reference.<sup>1</sup>

If a statute provides for the *reference* of claims of a certain nature, *e. g.*, claims arising *ex contractu*, but the agreement of parties includes also matters of a different nature, *e. g.*, claims sounding in tort, the undertaking will be construed to be a submission *in pais*.<sup>2</sup>

Where parties have in most particulars, but not in all, closely followed the provisions of a statute concerning references, but have used throughout the terms appropriate to a submission *in pais*, *e. g.*, "submit," "determine and award," "award and determination," this phraseology will generally be regarded as conclusively giving to their undertaking the character of a submission *in pais* instead of that of a statutory reference.<sup>3</sup>

A court of chancery having directed an issue to be tried by a jury, the parties agreed together *in pais* to waive the jury trial, and to submit to five persons, whose report should stand in lieu of a verdict. Held, that this was a submission to arbitration, and the report was an award.<sup>4</sup>

In Indiana, a pending cause was referred by agreement and order of court to "arbitrators," who returned an "award." It was held to be a common-law arbitration, and not a reference under the statute.<sup>5</sup>

**Submission of a "Cause" — 1. Its Extent and Operation on the Pleadings.** — The submission of a pending "cause" is a perfectly valid proceeding.<sup>6</sup> Such an undertaking, or an agree-

<sup>1</sup> *Bloore v. Potter*, 9 Wend. 480.

<sup>2</sup> *Akely v. Akely*, 17 How. Pr. 21.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Pleasants v. Ross*, 1 Wash. 156.

<sup>5</sup> *Moore v. Barnett*, 17 Ind. 349.

<sup>6</sup> *Cushing v. Babcock*, 38 Maine, 452.

ment of reference voluntarily entered into in a cause by the parties thereto, will be construed to include all the issues, whether of law or of fact, which are raised by the pleadings.<sup>1</sup> Beyond this, it is understood in our country that the case is to be tried and determined upon its merits, without regard to the technical issues joined by the pleadings, which are important only to show the extent of the submission and its subject-matter.<sup>2</sup> Accordingly any amendment which either party could have been allowed to make will be regarded as having been made, to the end that it shall be as nearly as possible the subject-matter of the suit that is referred, without regard to form.<sup>3</sup>

Any thing which could be introduced by way of amendment, either by altering or adding a count, provided this would amount only to presenting the same cause of action in a different shape, may be regarded as included in the submission. But matter which constitutes an independent cause of action cannot be introduced.<sup>4</sup> The cited case of *Merrill v. Gold* furnishes a good illustration of the exclusion worked by this rule. A. owed money to B.; C. represented to B. that he had funds of A. in his possession; B. thereupon sued A., and served garnishee process on C.; C. replied, under oath, that he had no funds of A. in his hands; B. then sued C. to recover damages caused by his false representations, whereby the plaintiff had been induced to bring his suit. The case was referred by consent. Before the referees the plaintiff wished to show that defendant in fact had funds, and had falsely sworn to the contrary. The court held that this fact, if true, constituted a

<sup>1</sup> *Cushing v. Babcock*, 38 Maine, 452; *Renouil v. Harris*, 2 Sandf. 641; *Newton v. West*, 3 Metc. (Ky.) 241.

<sup>2</sup> *Eddy v. Sprague*, 10 Vt. 216; *Davis v. Campbell*, 28 id. 236; *Coffin v. Cottle*, 4 Pick. 454; *Page v. Monks*, 5 Gray, 492; *Briggs v. Oaks*, 26 Vt. 138.

<sup>3</sup> *Maxfield v. Scott*, 17 Vt. 684; *Briggs v. Oaks*, 26 id. 138; *Same v. Bennett*, ib. 146; *Waterman v. Connecticut & Passumpsic Rivers R.R. Co.*, 30 id. 610.

<sup>4</sup> *Merrill v. Gold*, 1 Cush. 457. And see, also, in the chapter on "The Arbitrator's Authority" concerning "The arbitrator's power to allow amendments."

different cause of action from that sued upon, and that it was not open to the consideration of the referees, and consequently could not be proved before them.

When a statute authorizes the reference of a cause upon its appearing that it will involve the examination of a long account, the power of the referees is not confined solely to an investigation into the account, but extends over the entire cause, and all matters at issue in it. Every thing that might be inquired into on a trial should be heard and decided by them. Such a statutory limitation ought not to be narrowly construed.<sup>1</sup>

2. **Its Operation on Previous Errors.** — A submission or voluntary reference operates as a waiver,<sup>2</sup> or by way of bar, release, or estoppel,<sup>3</sup> in respect of all errors in the proceedings up to that time. Thus, for example, it is a bar to the objection that a plea in off-set had not been filed within the prescribed time;<sup>4</sup> it cures an insufficient service;<sup>5</sup> it is a waiver of a plea to the jurisdiction.<sup>6</sup> In a suit in ejectment a variance between the description of the premises in the declaration and that established by the evidence is avoided by a reference.<sup>7</sup>

But it is not a waiver of such a palpable misjoinder of plaintiffs as is fatal to the maintenance of an action by all or any of them;<sup>8</sup> neither of the objection that the court had no jurisdiction to make the order.<sup>9</sup>

Reference by agreement of parties of an appealed cause is a waiver of an objection to the jurisdiction of the justice from whose decision the appeal has been taken.<sup>10</sup>

<sup>1</sup> *Lee v. Tillotson*, 24 Wend. 337.

<sup>2</sup> *Vanderhoof v. Dean*, 1 Mann. (Mich.) 463; *Hazen v. Administrators of Addis*, 2 Green, 338; *Taylor v. Sayre*, 4 Zab. 647.

<sup>3</sup> *Forseth v. Shaw*, 10 Mass. 253; *Applegate v. Schureman*, 2 Penn. 868; *Ligon v. Ford*, 5 Munf. 10.

<sup>4</sup> *Swift v. Harriman*, 30 Vt. 607.

<sup>5</sup> *Hix v. Sumner*, 50 Maine, 290.

<sup>6</sup> *Maxfield v. Scott*, 17 Vt. 634.

<sup>7</sup> *Spaulding v. Warren*, 25 Vt. 316.

<sup>8</sup> *Porter v. Dickerman*, 11 Gray, 482.

<sup>9</sup> *Garcie v. Sheldon*, 3 Barb. 232.

<sup>10</sup> *Reed v. Stockwell*, 34 Vt. 206.

**Submission of a Cause may be made to include other Matters.** — The submission or reference will include nothing which is not involved in the action, unless there is an express stipulation to that effect. Such a stipulation is, however, perfectly valid, and the submission or reference may by agreement be extended to cover any number of alien matters.<sup>1</sup> The record should show what these matters are.<sup>2</sup> The parties may also insert in their rule provisions not called for by statute or the rules of court, and provided the same be not in violation of the rules of law, they will be sustained; *e. g.*, where the rule of court requires only that a majority of the arbitrators should agree in the award, the parties may stipulate for unanimity.<sup>3</sup> And a submission in *lis pendens*, extended to include other matters than those involved in the cause, may still remain a submission under a statute concerning submissions entered into in pending causes.<sup>4</sup>

If made, *pendente lite*, of “all matters of difference between the parties,” the submission or reference will not relate back to the date of the initiation of the suit, but embraces all such matters existing at the time of the execution of the submission.<sup>5</sup>

Where the declaration in a cause upon its face presents a case cognizable at common law, the court of common law is not ousted of further jurisdiction by the fact that at a hearing before arbitrators to whom the cause has been submitted, matters not properly cognizable at common law have been introduced.<sup>6</sup>

**Submissions of Separate Actions.** — Where distinct actions

<sup>1</sup> Henderson *v.* Walker, 2 Grant, (Penn.) 36; Remington *v.* Morris, *ib.* 457; Berkshire Woollen Co. *v.* Day, 12 Cush. 128; Bemus *v.* Quiggle, 7 Watts, 363; Smith *v.* Kincaid, 7 Humph. 28; Harrison *v.* Wortham, 8 Leigh, 296, in which “all matters of difference” were submitted. Harman *v.* Jennings, 22 Maine, 240.

<sup>2</sup> Fitzgerald *v.* Fitzgerald, Hardin, 227.

<sup>3</sup> Anderson *v.* Farnham, 34 Maine, 161.

<sup>4</sup> Bingham’s Trustees *v.* Guthrie, 19 Penn. St. 418.

<sup>5</sup> Woods *v.* Page, 37 Vt. 252.

<sup>6</sup> Caton *v.* McTavish, 10 Gill & J. 192.

are depending, and it is intended to refer them all, there must be separate rules and separate reports, or the actions must be first united and then referred, or in one of them a rule must be entered, submitting all matters in dispute between the parties. A consolidation effected by the arbitrators of their own sole action will invalidate their finding.<sup>1</sup>

**Effect of a Submission in a pending Cause upon the Status of the Cause.**—What effect a submission or reference has upon the status of the pending cause in court is a subject which has been thickly sown with difficulties by a great number of inconsistent and loosely expressed adjudications. I shall endeavor to do the best I can with the incongruous mass of material furnished by the various opinions, but can promise no lucid or satisfactory result.

In the first place, it would appear from some cases that a submission made *in pais*, not made or stipulating that it shall be made, or apparently intended to be made, a rule of court, does not, *ipso facto*, oust the court of its jurisdiction. It cannot be pleaded in bar.<sup>2</sup> Either party may proceed to push the case according to the regular mode of procedure, and if this be a breach of his undertaking contained in his submission, the remedy of the other party is by an action on the case for damages.<sup>3</sup>

But a far greater number of cases hold that a submission, though not statutory, nor made a rule of court, yet works a discontinuance of a pending cause.<sup>4</sup> In the case of *Green v.*

<sup>1</sup> *Craig v. Craig*, 4 Halst. 198; *contra*, by reason of apparent equity, in *Brown v. Scott*, 1 Dall. 145 (Shippen, Pres't, dissenting). The last case is discussed in *Goff v. Musser*, 2 Serg. & R. 262, by Tilghman, C. J., who says it is bad law, and that the dissenting opinion of President Shippen is sound.

<sup>2</sup> *United States v. Ames*, 1 Woodb. & Min. 76; *Eaton v. Arnold*, 9 Mass. 519; *Nettleton v. Gridley*, 21 Conn. 531; *Parnell v. King, Rice*, (S. Car.) 376; *Leonard v. House*, 15 Ga. 473; *Smith v. Barse*, 2 Hill, 387; *Fielding v. Westermeyer*, 20 La. An. 51.

<sup>3</sup> *Haskell v. Whitney*, 12 Mass. 47.

<sup>4</sup> *Mooers v. Allen*, 35 Maine, 276; *West v. Stanley*, 1 Hill, 69; *Towns v. Wilcox*, 12 Wend. 508; *Gunter v. Sanchez*, 1 Cal. 45; *Larkin v. Robbins*, 2 Wend. 505; *Vanderhoof v. Dean*, 1 Mann. 468; *Wells v. Lain*, 15 Wend. 99; *Saffle v.*

Patchen,<sup>1</sup> the previous adjudications in the New York courts were discussed, and it was stated as the "result," "that in all actions not referrible under the statute, if the parties refer the cause to referees, by stipulation or rule or both, and merely provide that the referees report, such reference is an arbitration, and *acts as a discontinuance*. But if the stipulation provides for the entry of judgment on the report, and judgment be entered, the parties are concluded by their agreement, and cannot be heard to say that the reference and judgment were not warranted by law." In *Wells v. Lain*,<sup>2</sup> the Chancellor, though in the minority on the main issue, said that the submission was only a *consent* to a discontinuance, and that if either party undertook to proceed with his suit in court, application should be made to stay him, on the ground that the case was in fact discontinued.

Some decisions assert that if the submission contain any saving clause, to the effect that it may be made a rule of court, or that judgment may be entered on the award, or the like, it will not operate as a discontinuance, for such stipulation is a clear expression of the intention of the parties to keep the suit alive.<sup>3</sup> *A fortiori* a reference, as of an account, by order of court is not a discontinuance, but is simply a proceeding in the cause, a part of the litigation.

In the case of *Camp v. Root*,<sup>4</sup> it was held that the submission was a discontinuance; for, though the parties entered it on the minutes, and directed the arbitrators to report to the court, they could not thus alter their rights nor give the

Cox. 9 Humph. 142. (But *contra*, *Bridges v. Vick*, 2 id. 516.) *Jewell v. Blankenship*, 10 Yerg. 439; *Bigelow v. Goss*, 5 Wis. 421; *Muckey v. Pierce*, 3 id. 307; *Smith v. Barse*, 2 Hill, 387; *Jordan v. Hyatt*, 3 Barb. 275; *Buel v. Dewey*, 22 How. Pr. 342.

<sup>1</sup> 13 Wend. 293.

<sup>2</sup> 15 Wend. 99.

<sup>3</sup> *People v. Onondaga Common Pleas*, 1 Wend. 314; *Rogers's Heirs v. Wall*, 6 Humph. 29; *Ex parte Wright*, 6 Cowen, 399. See also *Ryan v. Dougherty*, 30 Cal. 218; *Wear v. Ragan*, 30 Miss. 83.

<sup>4</sup> 18 Johns. 22.

court power to enter judgment on the award. This case was distinguished from that of *Yates v. Russell*,<sup>1</sup> contained in the next preceding volume of reports, and holding that neither party could object to the entry of judgment upon the report according to such an agreement. For, it was said, in *Yates v. Russell* the defendant's attorney had expressly stipulated that, in case of a report against him, judgment should be entered for the sum so reported, and this was considered equivalent to a plea of confession for that amount.

In *Larkin v. Robbins*,<sup>2</sup> the submission was declared to have worked a discontinuance, though the arbitrators had not yet assumed the burden of arbitration; for the parties had selected another tribunal, and the court would not look to the proceedings of that tribunal to see whether or not it (the court) still retained jurisdiction.

In Maine it has been said that a submission at common law is a discontinuance; but *quære*, as to a statutory submission.<sup>3</sup>

In California a submission under which the parties fail to follow the statute accurately will operate as a withdrawal of the cause from the power of the court, and no judgment can be entered on the award.<sup>4</sup>

Arbitrators agreed upon an award of a certain sum as due from the one party to the other, but held the award in their hands, subject to the condition that unless the payment should be made the suit should not be estopped. Held, that the sum not having been paid in due time, the whole proceeding of arbitration fell to the ground; and the suit, of which the submission was made, was not discontinued, but might be proceeded with.<sup>5</sup>

Where a submission of the subject-matter of a pending cause

<sup>1</sup> 17 Johns. 461.

<sup>2</sup> 2 Wend. 505.

<sup>3</sup> *Crooker v. Buck*, 41 Maine, 355.

<sup>4</sup> *Heslep v. San Francisco*, 4 Cal. 1.

<sup>5</sup> *Elliott v. Quimby*, 13 N. H. 181.

embodied an agreement to withdraw the suit from court, but the arbitrators named refused to act, the court said that the stipulations to submit and to withdraw were inter-dependent, and since, by no fault of either party, the arbitration had become impossible, the whole agreement should fall and the suit be regarded as still alive.<sup>1</sup>

Under similar circumstances, in New York, it was declared that the submission had put an end to the suit, but had not discharged the cause of action, and that upon the refusal of the arbitrators to act, the claimant was relegated to his original cause of action, and must institute a new suit.<sup>2</sup>

Where the cause had been carried into a higher court by appeal from the judgment of a lower court, and thereafter there was a submission which stipulated for the "discontinuance of the appeal," the arbitrators failed to agree. It was held, that, the appeal having been "expressly abandoned," the judgment of the original tribunal remained in full force.<sup>3</sup> But where, under like circumstances, the submission stipulated that "all further proceedings in said suit at law are to be hereby stayed and ended," it was held, that the suit at law was "blotted out and ended *in toto*," from its inception before the inferior tribunal to its latest subsequent stage.<sup>4</sup>

A party who, after a cause has been discontinued by a submission, proceeds with it in court, thereby waives or forfeits his right afterward to claim that it was discontinued.<sup>5</sup>

When the reference or submission does not operate to discontinue the cause, — or perhaps, we should rather say, to *put an absolute end* to the cause, for it appears that the phrase *discontinue* is often used improperly as if equivalent to *stay* or *interrupt*, — it has the effect of temporarily superseding the

<sup>1</sup> Chapman v. Seccomb, 36 Maine, 102; and see *ante*, Elliott v. Quimby, 13 N. H. 181.

<sup>2</sup> Buel v. Dewey, 22 How. Pr. 342.

<sup>3</sup> Miller v. Van Anken, 1 Wend. 516.

<sup>4</sup> Van Slyke v. Lettice, 6 Hill, 610.

<sup>5</sup> Buel v. Dewey, 22 How. Pr. 342.



power of the court to take any action in the cause. Pending the reference or submission, by rule, no proceeding can be had on the litigation in court. Neither party can take any of the steps which ordinarily he would be entitled to take; nor can the judges enter orders or entertain motions. No pleadings or papers, ordinarily required, need be filed. The regular tribunal has for the time been superseded by the special tribunal before which alone any thing can now be done.<sup>1</sup> The jurisdiction of the court, however, is not lost, it is only in abeyance. It revives so soon as the report or award has been returned into-court, or when the time limited for making this return has elapsed.<sup>2</sup> This effect of a reference or submission, as constituting only a link in the chain of litigation which precedes and follows it in the cause, without destroying the unity of that chain, has been carefully examined and discussed by the judges of Pennsylvania. The case of *Douglas v. Kenton*<sup>3</sup> especially deserves to be studied, as furnishing the fullest and best exposition of the true doctrine in respect to this subject. It is there said that the court retains a jurisdiction "outside of and superior to" that of the arbitrators; the power of the court to proceed to try the cause is suspended only so far as is necessary to enable the arbitrators to try it; after their award the jurisdiction of the court reverts, either, it may be, on appeal, or for judgment and issue of execution.

By a submission of a pending cause without a rule, it is so far out of court that the court is deprived of summary jurisdiction over the taxation of costs, which is directed by the award to be made.<sup>4</sup>

<sup>1</sup> *Horn v. Roberts*, 1 Ashm. 45; *Pollock v. Hall*, 4 Dall. 222; *M'Call v. Croussillat*, 6 Serg. & R. 167; *Brown v. Schæffer*, 6 Binn. 177; *Crawford v. Gable*, 2 Barr, 444; *Withers v. Haines*, ib. 435; *Grubb v. Grubb's Executors*, 2 Dall. 191; *Pollock v. Hall*, 4 id. 222; *Maxfield v. Scott*, 17 Vt. 634; *Hazen v. Administrators of Addis*, 2 Green, (N. J.) 333; *Grubb v. M'Cullough*, 1 Yeates, 193. And see cases cited in the notes next following this.

<sup>2</sup> *Ibid*; also *De Lisle v. Priestman*, 1 Browne, 115.

<sup>3</sup> 1 Miles, 21.

<sup>4</sup> *Van Alstyne v. Wimple*, 4 Cow. 547.

But where a case had been decided in the lower court, and the decision appealed from, it was held that in order to divest either party of the right to enter the action at the term of the upper court to which the appeal was taken, and thereby to prevent the legal time of entry from going by, it was necessary either that there should have been a submission and award entirely settling the controversy prior to said term, or else the submission must in terms have named a time within which the award might be rendered, extending beyond the entry day of said term.<sup>1</sup>

The precise point at which the jurisdiction of the court becomes suspended and the exclusive jurisdiction of the arbitrators vests, is likewise decided chiefly by Pennsylvania authorities. It was doubted whether this point should be fixed at the entry of the rule or the choice of arbitrators. The former doctrine was asserted in *Mechanics' Bank v. Fisher*; <sup>2</sup> but this case was afterward directly overruled in *Camp v. Bank of Owego*,<sup>3</sup> and other adjudications seem to have settled the doubt in favor of the time of the choice of arbitrators.<sup>4</sup> So that if the entry of the rule to refer has been improperly prejudicial to either party, the court will stay the proceedings at any time before the arbitrators are chosen.<sup>5</sup>

The court in which the action is pending at the time of the entry of the rule, may inquire into the sufficiency of the proceedings preliminary to the appointment of the arbitrators. Their jurisdiction is contingent upon the regularity of the precedent action of the parties, and if any irregularity has occurred, the appointment will be null and void, and the authority of the arbitrators will not attach. But after their authority has once

<sup>1</sup> *Hayes v. Blanchard*, 4 Vt. 210.

<sup>2</sup> 1 Rawle, 341.

<sup>3</sup> 10 Watts, 130.

<sup>4</sup> *Schuykill Bank v. Macalester*, 6 Watts & S. 147; *Horn v. Roberts*, 1 Ashmead, 45.

<sup>5</sup> *Hoffman v. Locke*, 19 Penn. St. 57.

properly attached, the court can make no inquiry into the proceedings before them.<sup>1</sup>

**Effect of the Submission upon the Right of Action.**— If parties enter into a submission by which they are *bound* to present a certain claim, it will, at least after award made, operate as a bar to any subsequent suit to enforce such claim; and this equally whether it was or was not presented. But *aliter*, if the party was not *bound* so to present. So where A. and B. entered into a general submission, and A. had a claim growing out of an attachment, which he was at liberty to enforce either against B. who was the attaching creditor or against the officer, and he did not present it against B. at the hearing, it was held that he was not barred from afterward pushing it against the officer.<sup>2</sup>

The presumption is that any claim which the claimant was bound by the submission to present, was in fact presented and adjudicated upon. But if the claimant had the option to present it, or to withhold it for subsequent enforcement against another party, no such presumption exists.<sup>3</sup>

Pendency of an arbitration at the time of suit brought does not operate by its own force to divest the court of jurisdiction. The parties are in the same situation as if another suit had been pending in another court. The circumstance can be availed of only by a plea in abatement.<sup>4</sup> And the power to avail of the existence of a submission is altogether lost if the arbitrators have refused to act,<sup>5</sup> or the time limited in the submission for making the award has elapsed without any award having been made.<sup>6</sup>

A mere agreement to submit, not carried out by proceeding

<sup>1</sup> Thompson v. White, 4 Serg. & R. 135.

<sup>2</sup> Robinson v. Hawkins, 38 Vt. 693.

<sup>3</sup> Ibid.

<sup>4</sup> Small v. Thurlow, 37 Maine, 504. But see the chapter on "The Duration of the Arbitrator's Authority," where beginning a suit pending the arbitration is said to operate as a revocation of the submission.

<sup>5</sup> Brown v. Welcker, 1 Coldw. (Tenn.) 197.

<sup>6</sup> St. Martin v. Mestayé, 18 La. An. 320.

with the arbitration, is not a bar to a suit upon the cause of action intended to be submitted.<sup>1</sup>

Where a submission has been made and the arbitrators have refused to act, it would not ordinarily be conceivable that the submission could be properly regarded as a bar to a subsequent right of action. Such cannot reasonably be considered to be the intention of the parties. It would be properly presumed that the willingness of the arbitrators to act was an implied condition precedent to the taking effect of the agreement.<sup>2</sup>

**Making Submission a Rule of Court, or agreeing for Entry of Judgment on Award.**—Statutes occasionally provide that submissions *in pais*, either with or without *lis pendens*, may be made rules of court, and judgment entered on the award. Such has been the English practice, founded on the provisions of 9 & 10 Will. III. c. 15. It has been held in this country that it is not too late to make a submission a rule of court after the award has been made.<sup>3</sup> Since the parties have the right to refer, the application for a rule of court has been said to be an idle form,<sup>4</sup> and that consent of parties that the submission shall be made a rule of court will be implied if a pending action be referred to.<sup>5</sup> But *aliter*, if no action be pending.<sup>6</sup> If the statutory directions are not followed, no judgment can be entered on the award.<sup>7</sup>

But in the absence of statutes, the English practice has not obtained in the United States, and no judgment will be entered by the court on an award unless the referees proceeded upon authority vested in them by a rule of court.<sup>8</sup> In Maine it has

<sup>1</sup> *Tobey v. The County of Bristol*, 3 Story, 800.

<sup>2</sup> *Elliott v. Quimby*, 13 N. H. 181; *Buel v. Dewey*, 22 How. Pr. 342; *Chapman v. Seccomb*, 36 Maine, 102.

<sup>3</sup> *McClure v. Gulick*, 2 Harrison, 340; *Hazen v. Administrators of Addis*, 2 Green, (N. J.) 333; *Ex parte Vasques*, 5 Cow. 29.

<sup>4</sup> *Bemus v. Quiggle*, 7 Watts, 362; but see below, cases cited in note 8.

<sup>5</sup> *McAdams's Executors v. Stilwell*, 13 Penn. St. 90; *Large v. Passmore*, 5 Serg. & R. 51; *Ford v. Keen*, 13 Penn. St. 179.

<sup>6</sup> *Benjamin v. Benjamin*, 5 Watts & S. 562.

<sup>7</sup> *Carson v. Carson*, 1 Metc. (Ky.) 434.

<sup>8</sup> *Shearer v. Mooers*, 19 Pick. 308; *Simpson v. McBee*, 3 Dev. 581.

been held that where the submission had not been made a rule of court the award might be properly admitted as evidence, and judgment be based thereon.<sup>1</sup>

A reference to arbitrators, stipulating that the award shall be made a rule of court, will not discharge bail.<sup>2</sup>

Where parties in a pending cause enter into a submission which is not statutory, and which is not a reference, but which nevertheless stipulates for the entry of judgment upon the award, neither party can be permitted to allege for error against the entry of a rule for judgment that the proceedings were not authorized by law.<sup>3</sup>

A submission providing that if the award be under \$200 judgment may be entered by a justice of the peace, but if for a sum beyond his jurisdiction then by the District Court, is valid, and judgment on an award for \$741 may be entered by the court.<sup>4</sup>

**Reference in Cross Actions.**—In cross actions and cross applications for reference, a joint reference will be ordered, and the referees will be authorized to hold meetings at different places to accommodate both parties.<sup>5</sup>

When one of two cross suits has been referred, and in this reference all can be obtained that could be obtained by a reference of the other also, the other will not be referred; especially where the reference of both might operate to make one party unfairly bear the costs in each cause.<sup>6</sup>

**Alteration of the Submission.**—A submission, being an agreement and subject to the general laws governing contracts, may be altered after its execution in the same manner as any other contract of similar formality.

An oral submission may at any time be altered or enlarged

<sup>1</sup> *Cushing v. Babcock*, 38 Maine, 452.

<sup>2</sup> *Cunningham v. Howell*, 1 Ired. 9.

<sup>3</sup> *Farrington v. Hamblin*, 12 Wend. 212; *Yates v. Russell*, 17 Johns. 465.

<sup>4</sup> *McKnight v. McCullough*, 21 Iowa, 111.

<sup>5</sup> *Hart v. Trotter*, 4 Wend. 198.

<sup>6</sup> *Codwise v. Hacker*, 2 Caines, 251.

orally.<sup>1</sup> It has been held that a written submission may be extended without writing at the hearing by mutual consent to include additional matters. The introduction by both parties of such matters and of evidence concerning them, without contemporaneous objection, constitutes such an extension ; and the award, when rendered, cannot be overturned by reason of its touching upon these new matters.<sup>2</sup> To the same purport also is the following :—

A written submission to three arbitrators was entered into, providing that in case either of them could not be obtained a fourth person named should sit in his place. At the meeting all four attended, and by agreement of parties then and there made the four heard the case and awarded upon it. It was held that this was regular and legal.<sup>3</sup> In Massachusetts, also, it is held that a written submission may be abrogated in whole or in part and an express new agreement entered into orally ; but if such subsequent agreement is to be inferred, the evidence must be clear, and the implication strong and free from all doubt. Thus where there was a written agreement which named three arbitrators, the evidence, consisting wholly of books and papers, was laid before two of them. It was held that there was no sufficient proof of an agreement that these two might act instead of the three, for either party might have expected that the evidence, being all documentary, would be examined also by the third arbitrator, before the joint report of all was made.<sup>4</sup>

If after a submission has been entered into by bond, a further agreement is made under seal, bringing new matters before the arbitrators, subjecting to their power another person who was not a party to the original submission but is to the later agreement, and enlarging the power which the arbitrators already had over the subject-matter of the original submission,

<sup>1</sup> *Eveleth v. Chase*, 17 Mass. 458.

<sup>2</sup> *Woods v. Page*, 37 Vt. 252.

<sup>3</sup> *Blanchard v. Murray*, 15 Vt. 548.

<sup>4</sup> *Loring v. Alden*, 3 Metc. (Mass.) 576.

the tendency will be to construe the later writing, not as an alteration of the original submission, but as an entirely new undertaking, superseding its predecessor.<sup>1</sup>

In Pennsylvania it has been asserted, generally, that a submission by specialty may be subsequently altered by parol. The case was of a submission of disputes arising out of partnership dealings. Afterwards it was verbally agreed that one partner should take the books and pay the debts of the firm. It was held, that this was such an enlargement of the terms of the submission that this partner might be properly credited by the arbitrator with his payments made under this arrangement.<sup>2</sup>

If parties to a submission by bonds, after execution of the bonds, materially alter the submission by a subsequent valid agreement, enlarging the subject-matter, adding a new party, and extending the power of the arbitrators in respect of the matters originally submitted, the sureties on the bonds will be discharged from liability.<sup>3</sup>

**Extension of Time for Award named in Submission by New Agreement.** — If a submission, entered into by deed, name a time within which the award shall be made, it has been held that this time can be extended only by deed; and profert of the deed must be made in pleading.<sup>4</sup> But other cases have held, that if the submission be by bonds, the parties may enlarge the time by a written agreement not under seal.<sup>5</sup>

If made by indorsement on the submission, it seems that the instrument should be again properly delivered.<sup>6</sup> And it so far alters the original agreement that a stipulation therein for

<sup>1</sup> *Bullock v. Koon*, 4 Wend. 531.

<sup>2</sup> *Graham v. Graham*, 9 Penn. St. (Barr) 254. So, also, *Shockey's Administrator v. Glasford*, 6 Dana, 9; to the like effect are *French v. New*, 20 Barb. 481; *Cooley v. Dill*, 1 Swan, 313; *contra*, the English case, *In re Morphett*, 2 Dowl. & Low. 967.

<sup>3</sup> *Bullock v. Koon*, 4 Wend. 531.

<sup>4</sup> *George v. Farr*, 46 N. H. 171; *Brown v. Copp*, 5 id. 223.

<sup>5</sup> *Bloomer v. Sherman*, 5 Paige, 575; *Hill v. Taylor*, 15 Wis. 190.

<sup>6</sup> *Shermer v. Beale*, 1 Wash. 11; *Bryer v. Stewart*, 2 Hayw. 111.

making it a rule of court should be repeated in the indorsement.<sup>1</sup>

An agreement to extend, signed by one party only, is not valid even for the purpose of preventing him from taking advantage of a delay beyond the original time limited.<sup>2</sup>

If the submission be under a rule issued by a justice, any extension of time must appear on his record. Otherwise the award cannot be the basis of a judgment, though it may be good at common law.<sup>3</sup>

But an extension of time may be indirectly brought about by the operation of the doctrine of waiver. If, after the time named for the award has elapsed without award made, the parties should, without objection, appear and proceed with another hearing, the stipulation concerning time would be thereby waived. Practically there would be an extension. The preceding cases, therefore, must be taken to relate only to deliberate and specific agreements to extend.

An extension of time, unless consented to by the sureties on the arbitration bond, will operate to release them.<sup>4</sup>

A statutory submission, required to be acknowledged, if extended to include other matters, must be again acknowledged after the extension.<sup>5</sup>

**Substitution of New Arbitrator or Referee.** — After an order of reference has been entered into by stipulation, and the referee is named therein, no other person can be substituted in his place except by express consent of parties.<sup>6</sup> Nor can the parties to a reference by rule of court, by their own agreement *in pais* indorsed on the rule, substitute another for the referee named therein.<sup>7</sup> If they do so, the award cannot serve as the

<sup>1</sup> *Shermer v. Beale*, *supra*.

<sup>2</sup> *Peters v. Johnson*, 3 Har. & J. 291.

<sup>3</sup> *Lazell v. Houghton*, 32 Vt. 579; to the same effect, substantially, is *Russell v. Gray*, 6 Serg. & R. 145.

<sup>4</sup> *Brookins v. Shumway*, 18 Wis. 98.

<sup>5</sup> *Tudor v. Peck*, 4 Mass. 242.

<sup>6</sup> *Smith v. Warner*, 14 Mich. 152; *Shippen's Lessee v. Bush*, 1 Dall. 251.

<sup>7</sup> *Woodbury v. Procter*, 9 Gray, 18; but see *Browning v. M'Manus*, 1 Whart. 177; *contra*, *Manlove v. Thrift*, 5 Munf. 492; *Lattimore v. Martin*, Addis. 11.



basis of a judgment. But *quære*, whether it might be sustained as good at common law.<sup>1</sup>

If a submission expressly stipulates for a power of substitution, the courts will recognize those whom the parties themselves clearly recognize (*e. g.*, by proceeding before them) as invested with the authority of arbitrators.<sup>2</sup> And sometimes, after the parties have appeared and proceeded before a substitute, they will be held to have waived the right to object on the sole ground of the substitution.<sup>3</sup>

**Enlargement of Rule of Reference.** — After a rule of reference has been once made, it cannot be enlarged, either upon recommitment or otherwise, save with such consent of parties as would be necessary in the case of an entirely new reference.<sup>4</sup>

**Suit upon an Altered Agreement to submit.** — If the original submission has been altered by any subsequent agreement, the rule seems to be that suit must be brought upon the new agreement to submit, implied in the agreement of alteration taken in connection with the original bond. But suit cannot be sustained on the original bond itself, since no breach precisely of its conditions has taken place.<sup>5</sup> The same rule applies, *a fortiori*, where a new submission has been substituted for the original one.<sup>6</sup>

**Correction of Errors in Submission.** — Clerical errors and omissions will either be corrected, or at least not allowed to invalidate subsequent proceedings under the submission: *e. g.*, the accidental omission of the name of the third arbitrator in one bond;<sup>7</sup> the accidental omission of a date, when the report was

<sup>1</sup> Ibid; and see *Lazell v. Houghton*, 32 Vt. 579 (cited *supra*).

<sup>2</sup> *Henneigh v. Kramer*, 50 Penn. St. 530; and see *ante*, *Blanchard v. Murray*, 15 Vt. 548.

<sup>3</sup> *Browning v. M'Manus*, 1 Whart. 177; *Bemus v. Clarke*, 29 Penn. St. 251.

<sup>4</sup> *Baxter v. Thompson*, 25 Vt. 505; *Rice v. Clark*, 8 id. 104.

<sup>5</sup> *Freeman v. Adams*, 9 Johns. 115 (citing and relying on English causes); *Bloomer v. Sherman*, 5 Paige, 575; *Myers v. Dixon*, 2 Hall, (Sup. Ct. N. Y.) 456; *Shockey's Adm'r v. Glasford*, 6 Dana, 9; *contra*, *Brookins v. Shumway*, 18 Wis. 98.

<sup>6</sup> *George v. Farr*, 46 N. H. 171.

<sup>7</sup> *Hill v. Taylor*, 15 Wis. 190.

sufficiently dated.<sup>1</sup> So where the words of the bonds were: "Decision of the whole or any two of them shall be binding; then the above obligation to be void; otherwise," &c., it was held a condition for the performance of the award.<sup>2</sup>

How long the Submission will remain in Force is a subject considered in the chapter upon "The Duration of the Arbitrator's Authority." The submission remains in force so long as the authority of the arbitrator endures and *e converso*; but it seemed proper to discuss the topic under the above-named head rather than in this connection. One point only may be appropriately noticed here, as follows:—

If for any reason the submission is not binding upon all the parties thereto, it fails to be binding upon any of them.<sup>3</sup> In the cited case, the submission was not binding by reason of a failure of the consideration moving one of the parties to enter into it; that consideration having been the undertaking of the other party to do something which he was legally incompetent or unable to do. But it has been also held that the state of affairs prior to the submission cannot be gone into for the sake of showing that the agreement to submit was without consideration as towards one of the parties to it, and therefore void.<sup>4</sup>

**Stipulation in Submission to waive Appeal from Award.**—Parties may waive their right to appeal from an award returnable into court, or to file exceptions thereto. But they must do it by express language, stating this specific intent, embodied in the submission. Thus an agreement of submission in a pending cause stipulated that the award should be final and conclusiye; that neither party should have a right to appeal or file exceptions to it, and that judgment should be entered upon it so soon as it should be filed. The court held that, though the statute gave a right of exception for an alleged mistake of fact, the parties had by their stipulation conclusively abandoned

<sup>1</sup> Bacon v. Ward, 10 Mass. 141.

<sup>2</sup> Kesler v. Kerns, 5 Jones, Law, 191.

<sup>3</sup> Yeamans v. Yeamans, 99 Mass. 585.

<sup>4</sup> Schoff v. Bloomfield, 8 Vt. 472.

this right. "That the court may disregard this agreement of the parties . . . has not been seriously contended, and certainly cannot be claimed successfully."<sup>1</sup>

Such agreements have even been held to estop a party from claiming a writ of error, though it is a writ of right.<sup>2</sup> Though in a case cited, *Andrews v. Lee*, the court remarks: "I admit that bribery or corruption would vacate an award made under any submission: so if the award was in terms which could not be enforced, &c., &c., but nothing of the kind appears here."<sup>3</sup> So also in California, in case of fraud or mistake appearing upon the face of the award.<sup>4</sup>

But the stipulation must be an express waiver in terms. An agreement simply that the award shall be "final and conclusive" is powerless to take away the right to assail its validity in the ordinary way and upon the ordinary grounds. The words are commonly used to express the intention of the parties to be bound by the award, but they are not of greater force.<sup>5</sup> Such a stipulation is subject to the implied condition that the award be made according to the submission.<sup>6</sup>

Whether or not the attorney of a party in a pending cause, entering into a submission in the same, has authority to stipulate that the right to except to the award shall be waived, is discussed but not finally adjudicated in *Bingham's Trustees v. Guthrie*.<sup>7</sup>

**Stipulation to "abide by" an Award.**—A stipulation to "abide by" an award is by no means equivalent, to a stipu-

<sup>1</sup> *McCahan v. Reamey*, 33 Penn. St. 535; *Rogers v. Playford*, 12 Penn. St. 181; *Bingham's Trustees v. Guthrie*, 19 Penn. St. 418; *Wightman v. Pettis*, 29 Penn. St. 283.

<sup>2</sup> *Cuncle v. Dripps*, 3 Penn'a 291; *Andrews v. Lee*, 3 id. 99; and see *McCahan v. Reamey*, 33 Penn. St. 535; *Townsend v. Masterson Stone Dressing Co.*, 15 N. Y. 587; also a *dictum* in *Rauck v. Becker*, 12 Serg. & R. 412 (p. 416).

<sup>3</sup> And see *Rogers v. Playford*, 2 Jones, 181; *Daniels v. Willis*, 7 Minn. 374.

<sup>4</sup> *Muldrow v. Norris*, 2 Cal. 74.

<sup>5</sup> *McCahan v. Reamey*, 33 Penn. St. 535; *Large v. Passmore*, 5 Serg. & R. 51; *Mussina v. Hertzog*, 5 Binn. 387. But see *Daniels v. Willis*, 7 Minn. 374.

<sup>6</sup> *McCracken v. Clarke*, 31 Penn. St. 498.

<sup>7</sup> 19 Penn. St. 418.

lation to dispense with the right to dispute the validity of the award. It should rather be construed as equivalent to an agreement to abide an award, or to "await the award without revoking the submission."<sup>1</sup> If it be allowable to criticise an adjudication, it would certainly seem that this last construction of the phrase is hardly warranted by the real meaning of the words. They are often used in connection with the word "perform," and an agreement to abide by and perform "an award" probably means no more than simply "to perform." The ruling probably should be taken only as saying that an agreement to abide by an award is of no greater force than an agreement that it shall be "final and conclusive," already commented upon.

<sup>1</sup> Shaw v. Hatch, 6 N. H. 162.

## CHAPTER III.

### AGREEMENTS TO SUBMIT.

No specific performance granted in equity.

Liability of party refusing.

Agreements to refer embodied incidentally in other contracts.

Agreement to refer, as condition precedent to right of action.

Pleadings.

Damages for refusal to refer according to agreement.

Breach of bond.

**No Specific Performance granted in Equity.** — “It is well settled,” says Judge Selden, “that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration.”<sup>1</sup>

In an elaborate opinion,<sup>2</sup> delivered by Mr. Justice Story, the rule that a court of equity will not enforce specific performance of an agreement to refer is laid down, and is supported both by argument and authority.<sup>3</sup> A naked “agreement to refer, without saying more, how, and when, and to whom the submission is to be, can hardly be deemed any thing more than an inchoate and imperfect agreement, the first step only in a negotiation which is to fall of itself if the arbitrators are not afterwards agreed upon.” But if these subsequent matters, such as the nomination of the arbitrators, have all been settled, and the agreement to refer is complete and absolute, still the impossibility of enforcing specific performance survives. “The cases are divided into two classes: one where

<sup>1</sup> *Greason v. Keteltas*, 17 N. Y. 491; *Hurst v. Litchfield*, 39 N. Y. 377; *Sinclair v. Tallmadge*, 35 Barb. 602; *March v. Eastern Railroad*, 40 N. H. 548; *Smith v. Boston, Concord & Montreal Railroad*, 36 id. 487.

<sup>2</sup> *Tobey v. County of Bristol*, 3 Story, 800.

<sup>3</sup> He cites *Wellington v. Mackintosh*, 2 Atk. 569; *Mitchell v. Harris*, 4 Bro. Ch. 311; s. c. 2 Ves. Jr. 129; *Kill v. Hollister*, 1 Wils. 129; *Street v. Rigby*, 6 Ves. Jr. 815; *Thompson v. Charnock*, 8 Term, 139.

an agreement to refer to arbitration has been set up as a defence to a suit at law as well as in equity ; the other, where the party, as plaintiff, has sought to enforce such an agreement in a court of equity. Both classes have shared the same fate. The courts have refused to allow the former as a bar or defence against the suit, and have declined to enforce the latter as ill-founded in point of jurisdiction." The principles upon which this ruling is based are also given by the learned judge. "The first ground is, that a court of equity ought not to compel a party to submit the decision of his rights to a tribunal which confessedly does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice." This should not be construed as equivalent to a discouragement of arbitrations as against public policy. The contrary is in fact the case. But the difficulty lies in *compulsion*, and the taking away from the party who has entered into such an agreement the *locus pœnitentiæ*. In the second place, "it is an established principle of courts of equity never to enforce the specific performance of any agreement, where it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement impracticable or inequitable to be enforced." The strength and appositeness of these objections to a bill for specific performance seemed to his honor so great, that he said that even had he been unfettered by authorities, and free to decide the matter as a new question, he did not see how he could have reached a different conclusion.

The same rule is well established also in England.<sup>1</sup>

**Liability of Party refusing.**—The party refusing or rendering it impossible to abide by the agreement to refer, is liable to the other for damages, to be recovered in an ordinary suit based

<sup>1</sup> *Gourlay v. Duke of Somerset*, 19 Ves. Jr. 431; *Agar v. Macklew*, 2 Sim. & Stu. 418; *Mitchell v. Harris*, 2 Ves. Jr. 129, notes 3, 4, Sumner's ed.; *Earl of Mexborough v. Bower*, 7 Beav. 127; *Tattersall v. Groote*, 2 Bos. & P. 131; *Darbey v. Whitaker*, 4 Drew. 134.

on the breach of contract. But this is the only remedy of the injured party.<sup>1</sup>

Agreements to refer embodied incidentally in other Contracts. — If there be inserted in a contract a simple provision or agreement, declaring that any disputes which shall arise thereunder shall be referred to arbitration, this will not suffice to oust the courts of law of their ordinary jurisdiction. Either party may sue the other upon the contract, without having made any effort towards carrying out the reference.<sup>2</sup> His doing so will probably lay him open to be sued in his turn for damages for breach of his agreement to refer.<sup>3</sup> But his own suit will not be stayed or impeded by the agreement.

Nor does it make any difference that the arbitration has actually been entered upon and proceeded with, but without success in obtaining an award. Suit may still be maintained upon the original contract.<sup>4</sup>

But if, in pursuance of the agreement, the parties have proceeded in the arbitration, and an award has actually been made, it has precisely the same force as an award under ordinary circumstances, and the power of the courts to entertain a suit on the original contract is at an end.<sup>5</sup>

In Pennsylvania, whenever incidental agreements for estimating and valuing work are inserted in contracts, the tendency of the courts has been to hold the parties very strictly to the per-

<sup>1</sup> *Haggart v. Morgan*, 5 N. Y. (1 Seld.) 422; *Miller v. President, &c., of the Junction Canal Co.*, 53 Barb. 590.

<sup>2</sup> *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 487; *March v. Eastern Railroad*, 40 id. 548; *Randel v. Chesapeake & Delaware Canal Co.*, 1 Har. 233; *Stone v. Dennis*, 3 Porter, 231; *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; *Gray v. Wilson*, 4 Watts, 39; *Cavanagh v. Dooley*, 6 Allen, 66; *Rowe v. Williams*, 97 Mass. 163; *Hurst v. Litchfield*, 39 N. Y. 377. Such agreements are not equivalent to agreements not to sue. *Street v. Rigby*, 6 Ves. Jr. 814; *Dimsdale v. Robertson*, 2 Jones & La. 58, overruling *Tattersall v. Grootte*, 2 Bos. & P. 131; *Percival v. Herbeumont*, 1 M'Mullan, 59.

<sup>3</sup> *Ibid.*; *Livingston v. Ralli*, 24 L. J. Q. B. 269; 5 El. & Bl. 132.

<sup>4</sup> *Cavanagh v. Dooley*, 6 Allen, 66.

<sup>5</sup> *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 487; *Cleworth v. Pickford*, 7 Mee. & W. 314.

formance of such agreements, as being at least a necessary preliminary to the right to sue. The decision of the referee will be conclusive as to quantity, price, &c., and afterwards suit can be brought only to enforce or recover upon his findings.<sup>1</sup> In one case,<sup>2</sup> where the agreement was to "waive any right of action, suit, or suits, or other remedy in law or otherwise," and that the decision of the engineer should, "in the nature of an award, be final and conclusive," the courts held it to be a complete and binding submission to arbitration, and that there was no right in the one party to sue the other, although the engineer refused to act, or decided wrongly or even fraudulently. The remedy could be only by suit against him. This is a very interesting cause and well worthy of careful examination. The Pennsylvania rule is in fact equivalent to holding such agreements to be always conditions precedent to the right to sue, a subject considered hereafter. The courts of other States differ from those of Pennsylvania only inasmuch as they manifest less willingness to adopt this construction in cases where the precise language would not have the effect of creating such a condition.

But in *Snodgrass v. Gavit*,<sup>3</sup> where the incidental agreement provided for a reference to arbitrators to be *mutually chosen*, and one party sued the other on the contract without any submission having been made in pursuance of the proviso to that effect, the court refused to allow the defendant to set up in defence the failure to carry out the agreement to refer, unless he showed positively that he himself had been ready and desirous to carry it out, and had been prevented from doing so only by the refusal of the plaintiff to concur with him. Otherwise "the inference was a fair one that the indefinite submission mentioned in the articles had been waived, and each party left

<sup>1</sup> *O'Reilly v. Kerns*, 52 Penn. St. 214; *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205; *Faunce v. Burke*, 16 Penn. St. 480; *Snodgrass v. Gavit*, 28 id. 221.

<sup>2</sup> *Reynolds v. Caldwell*, 51 Penn. St. 298.

<sup>3</sup> 28 Penn. St. 221.



to his full rights both of attack and defence." This case is an earlier one than that of *Reynolds v. Caldwell*, and is not apparently intended to be overruled by it. Yet the two certainly escape inconsistency only by the aid of very strict and narrow construction. It is probable that the more moderate force which *Snodgrass v. Gavit* gives to incidental agreements to refer, would be regarded as the more acceptable doctrine in most States.

In England it is said that if the agreement to refer future disputes names the referee, then it is a complete submission.<sup>1</sup> So it is, also, if it provides the manner in which they shall be nominated, and they in fact are afterward nominated in this manner, despite that one of the parties is unwilling.<sup>2</sup>

**Agreement to refer as Condition precedent to Right of Action.** — But if the parties agree substantially to make the reference a condition precedent or necessary preliminary to the institution of a suit, then the reference must be carried out.<sup>3</sup> Thus if in a building contract it should be provided that the architect's certificate of the value of any extra work should be obtained as a condition precedent to the right to bring an action for such value, then the certificate would have to be procured before suit could be sustained.<sup>4</sup>

Or the stipulation may be, to pay so much as a third person shall determine to be just; or it may be, that work shall be done or materials furnished, to the satisfaction or acceptance of a third person; or that the price to be paid shall be dependent upon his decision as to the quantity, quality, or price of the materials or workmanship.<sup>5</sup> In each of these cases the action

<sup>1</sup> *Parkes v. Smith*, 15 Q. B. 297.

<sup>2</sup> *Haddan v. Roupell*, 9 C. B. N. s. 683; *Woodcroft v. Jones*, 9 Dowl. 538.

<sup>3</sup> *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 458; *Rowe v. Williams*, 97 Mass. 163; *Goldstone v. Osborn*, 2 Car. & P. 550; *Scott v. Avery*, 8 Exch. 487; 5 H. of L. Ca. 811; *Tredwen v. Holman*, 31 L. J. Exch. 398; *Russell v. Pelegrini*, 6 El. & Bl. 1020; *Hemans v. Picciolto*, 1 C. B. N. s. 646; *Braunstein v. Accidental Death Ins. Co.*, 31 L. J. Q. B. 17; *Westwood v. Secretary for India*, 1 N. R. 262.

<sup>4</sup> *Hurst v. Litchfield*, 39 N. Y. 377.

<sup>5</sup> *Smith v. Boston, Concord & Montreal R.R.*, 36 N. H. 458. And see *United States v. Robeson*, 9 Pet. 327.

of the third person must take place before the right to sue can mature.

Where a lease stipulated that at the close of the term the value of the buildings should be appraised by persons to be chosen by the parties, and that the lessor should purchase the buildings of the lessee at the price so set by the appraisers, it was held, that before the lessee could sue for the value of the buildings he must show that he had done all that was reasonably in his power to have the appraisal made; that having shown this, and that his efforts had been vain, he might then sue for the fair value; but that the failure of a board of appraisers to agree, or their misconduct such as to disqualify themselves, was not conclusive evidence; as matter of law, that the lessee had used all such reasonable exertions.<sup>1</sup>

An agreement of parties was that a payment for labor on certain houses should be made when the architect should give a certificate that "the work was fully and completely finished according to the specification." Held, no suit could be maintained until this certificate, either in the precise terms used or in language practically equivalent, should have been given; though there was no tendency manifested to regard the required proceeding as an arbitration.<sup>2</sup>

The rules of a Maine insurance company, established on mutual principles, required an award by arbitrators as a condition precedent to a suit, and that the suit should then be brought only for the amount awarded. It was held that these provisos were legal and binding upon members.<sup>3</sup>

The duty of procuring the decision of the referee in cases like the foregoing rests primarily upon the party who will have the claim for payment; *i. e.*, upon the plaintiff in the suit to be brought after the right of action shall have accrued. He must use his best exertions to bring about and perfect the

<sup>1</sup> Hood *v.* Hartshorn, 100 Mass. 117.

<sup>2</sup> Smith *v.* Briggs, 3 Denio, 73.

<sup>3</sup> Scott *v.* Avery, 5 H. of L. Ca. 811.

agreement of reference. And it seems that his failure to bring it about will enable him to institute suit without it, only in case the obstacle to his success has grown out of the contumacious action of the other party. The debtor cannot, by preventing the perfection of the reference, escape the liability to be sued.<sup>1</sup>

**Pleadings.**—In suit brought under a contract containing a stipulation in the nature of a condition precedent for a measurement or estimate to be made by a third party, or for labor or materials to be according to his satisfaction, it must be alleged that he has made the estimate or has accepted or is satisfied with the work or materials. For, unless it appears that these things have been done or their performance excused, it is not shown that the right of action has accrued. If this averment be omitted, the plaintiff must be nonsuited on the ground of variance, since the contract alleged is absolute, and that proved is conditional. If, however, the contract be truly stated, but the fact of a decision by the referee is omitted, the declaration will be held bad on demurrer or in arrest of judgment, as showing no cause of action; or the plaintiff will be nonsuited, because his evidence fails to show a right of action.<sup>2</sup> If the reference has been prevented by the defendant, in spite of the endeavors of the plaintiff to perfect it, this fact must be averred.<sup>3</sup>

If the stipulation of the contract is that the estimate shall be made by, or the work and materials be furnished to the satisfaction and acceptance of, the party who is to make the payment for them, it will be void by virtue of the general rule that no man shall be a judge in his own cause. In such case, it need only be alleged that the work was properly performed, that the defendant ought to have accepted it, and wrongfully refused to do so, or that he ought to have made an estimate, and

<sup>1</sup> *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 458.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

wrongfully refused to do so, or made an erroneous one ; and that the correct estimate is, &c. And it has sometimes been held that these stipulations need not be referred to at all in the declaration.<sup>1</sup>

**Damages for Refusal to refer according to Agreement.** — Russell says that under the shape in which agreements to submit embodied incidentally in other contracts are usually drawn up, only nominal damages could be recovered, since the jury would have no means of estimating substantial damages.<sup>2</sup> Lord Eldon advises the naming of some sum as liquidated damages.<sup>3</sup> A case in the courts of Vermont says that the party refusing to proceed shall refund the costs and expenses incurred by the other, unless the cause of action has been released as a consideration for the submission ; in which event, the value of the cause of action must be included in making up the damages.<sup>4</sup>

**Breach of Bond.** — If an arbitration bond contains a clause binding the parties to “ have and perfect ” the reference, either of them who hinders the arbitrators from proceeding and awarding commits a breach of the bond ; and this equally whether the arbitrators have or have not actually undertaken to arbitrate or to award ; and whether the hinderance related to the whole subject-matter of the arbitration, or only to some small portion thereof falling incidentally within the authority of the arbitrators.<sup>5</sup>

The consequence of the misconduct of parties in neglecting or refusing to present a claim, which by the submission they are bound to present, thereby making a breach of their agreement to refer, is discussed under the head of “ Operation and Effect of the Award.”

<sup>1</sup> *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 458.

<sup>2</sup> *Russell on Awards*, 3d ed. p. 63.

<sup>3</sup> *Street v. Rigby*, 6 Ves. Jr. 814.

<sup>4</sup> *Day v. Essex County Bank*, 13 Vt. 97.

<sup>5</sup> *Quimby v. Melvin*, 28 N. H. 250 ; 35 id. 198.

## PART II.

THE ARBITRATOR.



## CHAPTER IV.

### THE OFFICE OF ARBITRATOR.

Who may be an arbitrator.

Disqualifications.

1. Interest.

2. Relationship.

3. Preconceived opinion.

Waiver of objection on any of the aforesaid grounds.

Time, etc., of availing of objection on the aforesaid grounds.

A party may be also an arbitrator.

Judge of court as referee.

Arbitrators are agents of the parties.

They must be impartial agents of both parties alike.

Impartiality is a fundamental requisite.

Officials as arbitrators.

Public commissioners are amenable to the court.

Absence of person named as arbitrator.

Administration of oath to arbitrator.

Statutory provisions concerning arbitrator's oath.

Effect of neglect to administer oath.

Form of oath.

Dispensing with oath.

Presumption concerning the oath.

Pleadings concerning the oath.

Swearing the umpire.

**Who may be an Arbitrator.**—As a general statement, it may be said that any person whomsoever may be chosen to fill the position of arbitrator. “Neither natural nor legal disabilities,” says Russell, “hinder a person from being an arbitrator.”<sup>1</sup> And he adds that “it has indeed been laid down as law, in works to which great respect is due, that idiots, lunatics, infants, married women, persons attainted and excommunicated, are disqualified for the office ;<sup>2</sup> but the better opinion is, that they

<sup>1</sup> Russell on Arb., 3d ed. p. 105 ; citing *Huntig v. Ralling*, 8 Dowl. 879.

<sup>2</sup> Com. Dig. Arb. C., West. Symb., pt. II., Tit. Compromise, pp. 164, 165, §§ 23, 26.

may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected.”<sup>1</sup>

**Disqualifications.** — Yet there are various facts affecting the relationship of the person named as arbitrator, or his sentiments, towards any party to the submission, which, if not known at the time of entering into the submission, may avoid it at any stage in the proceedings, or may even avoid the award itself.

**1. Interest.** — If the person selected as arbitrator has any secret interest in the result or decision of the controversy, he is incompetent.<sup>2</sup> But the interest, in order to have this effect, must not be so remote or contingent that it cannot supposably affect his action. Thus shareholders in a bank which holds shares in a railroad corporation pledged to it as collateral security by a person in good financial standing, are not disqualified by reason of interest from acting as arbitrators under a submission to which the railroad company is a party.<sup>3</sup> In this case, the testimony of the referees was offered to prove their ignorance of the fact that such security was held by the bank. The evidence was objected to. But the court said it was altogether immaterial whether it was properly admitted or not, since the interest of the referees “was too remote and contingent to induce any reasonable suspicion that it could have influenced their decision.”

A debtor or creditor of one of the parties to the submission is said not to be, therefore, necessarily incompetent to act as an arbitrator. It should be shown further that the debt is considerable, or that it is unsecured, or that the debtor is in such circumstances that the decision of this case may appreciably affect his ability to pay the debt; or otherwise that the

<sup>1</sup> Bacon's Abr. Arb. D.; *Huntig v. Ralling*, 8 Dowl. 879.

<sup>2</sup> *Parker v. Burroughs*, Colle's Parl. Ca. 257; *Earl v. Stocker*, 2 Vern. 251; and also cases cited below.

<sup>3</sup> *Inhabitants of Leominster v. Worcester R.R. Co.*, 7 Allen, 38.



decision may affect the creditor's chances of obtaining payment.<sup>1</sup>

2. **Relationship.**—The existence of a relationship or family connection between the arbitrator and a party to the submission, will be a sufficient ground for a revocation pending the proceedings, or for setting aside the award afterward.<sup>2</sup>

3. **Preconceived Opinion.**—Persons who already have formed an opinion, or received a bias, on the subject-matter of the submission, are incompetent to act as arbitrators.<sup>3</sup> For example, where an architect had assured a lady that the price of building a certain church should not exceed a specified sum, though he had refused to guarantee it, he was held by a court of chancery to be an improper person to determine upon claims for extras made by the builder against the lady.<sup>4</sup> So, also, where a loss by fire had taken place, which was covered by an insurance policy, and the insurers sent down two persons immediately after the fire to make an estimate of the amount of damage, and these persons did so, and were afterward, upon a dispute arising, suggested as arbitrators by the insurers, and accepted by the defendants, who knew, indeed, that their last names were the same as those of the parties who had made the estimate, but did not know them to be in fact the identical persons, it was held that this was a sufficient reason for avoiding the award.<sup>5</sup>

In each of these cases, the opinion of the person nominated as arbitrator was, at least substantially, known to the party in whose favor it might be expected to operate. Whether or not the existence of a prepossession or prejudice in the mind of the arbitrator, if wholly unknown to both parties, or if known only to him *against* whom it would operate (if this latter case

<sup>1</sup> *Wallis v. Carpenter*, 13 Allen, 19; *Morgan v. Morgan*, 1 Dowl. 611; *Drew v. Drew*, House of Lords, March 8, 1855, cited in Russell on Arb., 3d ed. p. 106.

<sup>2</sup> *Brown v. Leavitt*, 26 Maine, 251.

<sup>3</sup> *Fox v. Hazelton*, 10 Pick. 275, stated at length below.

<sup>4</sup> *Kemp v. Rose*, 1 Giff. 258.

<sup>5</sup> *Conrad v. Massasoit Insurance Company*, 4 Allen, 20.

be conceivable), would avoid the award, is a very different question, not determined by any adjudicated case so far as I can discover. In *Fox v. Hazelton* it is left doubtful whether the plaintiff knew of the bias in the referee's mind in his favor and against the defendant. But there was no evidence to this effect offered, and the inference would be, since it was not alleged that the plaintiff was cognizant of the fact, that he really was not so, or was not supposed to be so.

**Waiver of Objection on any of the Aforesaid Grounds.**—But the parties may, if they choose, waive the objection which might exist on any of the preceding grounds. They are at liberty to select a person interested or a person prejudiced, a relation or an enemy of either of them. Judge Cushing said, in *Strong v. Strong*:<sup>1</sup> “If indeed parties in controversy choose to waive the right of impartial trial, and purposely and avowedly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending, will not set aside the award merely because of the character of the arbitrators.” And Chief Justice Shaw said, in *Fox v. Hazelton*:<sup>2</sup> “*Volenti non fit injuria*. If parties are content to submit questions in controversy to those who are known to have formed and expressed opinions upon the subject-matter, or who are known to have partialities or prejudices for or against the respective parties, an award made by such arbitrators is binding.” As it often happens, each party selects some one in whose favorable opinion he reposes confidence, and it is trusted that the opposite prejudices will balance each other. Awards made by such referees cannot be impeached.

A person selected as a referee had, at various times, expressed a strong bias, almost equivalent to a prejudgment of the case, in favor of one the parties and against the other. The latter party was not aware of this fact at the time of agreeing

<sup>1</sup> 9 Cushing, 560.

<sup>2</sup> 10 Pick. 275.

upon the referee. But afterward, and before the hearing, he was told by another person of the expressions which had been used by the referee, and he learned other facts which might create a suspicion of the existence of a prejudice against himself. He took no notice of this information, however, and proceeded with the hearing without objection. Not until after the report had been rendered did he move the court to set aside the award on the ground of partiality. The motion was refused. Chief Justice Shaw said: "If the objection is known to the party before the hearing and not then disclosed, and no exception taken, the objection must be taken to be waived, and the consent of the parties be presumed, that the hearing shall proceed. . . . The evidence is quite sufficient to show that if the party was not fully apprised of the partiality of the referee before the hearing, he had ample notice to put him upon inquiry which would have led to the full knowledge of the fact; and had the exception been taken at the hearing, and the referees had persisted in proceeding, it would have been a strong ground of objection to the award. As he was content to proceed with a knowledge of the fact, relying upon the strength of his cause, or the capacity and firmness of the other referees, he must be deemed to have waived his exception."<sup>1</sup>

Hence arises the necessity for the existence of the element of secrecy, at least as towards the party likely to be injured by the existence of interest or relationship, or by the preconceived opinion or bias. If such party is aware of the fact at the time of entering into the submission, and nevertheless voluntarily binds himself by the undertaking, he cannot afterward make it the basis of an objection. He will be taken to have conclusively waived his right to avail himself of it in this manner. Thus if parties submit to one whom they know to be the owner of certain lands, a question respecting the mode and expense of making a drain which will substantially benefit his estate, his award will be good in spite of his own interest

<sup>1</sup> Fox v. Hazelton, 10 Pick. 275.

in it.<sup>1</sup> And the architect or surveyor, employed to superintend a builder in the erection of a house, and whose pay is a commission on the amount of the building charges, may act as an arbitrator between the builder and the employer, provided the latter agrees to it.<sup>2</sup>

A somewhat odd case was where the parties had bound themselves in a bond *to the arbitrator* to abide by his award. It was argued that the arbitrator was interested to make an unreasonable award, so that the losing party should be tempted to refuse to perform it, and should forfeit the penalty. But this objection was overruled, and the submission and award were upheld.<sup>3</sup>

It seems that knowledge on the part of the attorney of a party may sometimes be equivalent to knowledge of the party himself. Where the reference was to three persons, of whom one was in the same room with the plaintiff's attorney and in daily and friendly intercourse with him, the court refused to treat the fact as a ground for setting aside the award, because it was "known to the defendant's attorney before the reference commenced." Whether or not the defendant personally knew the fact does not appear; the court was content to rest its decision on the knowledge of his attorney.<sup>4</sup>

**Time, &c., for availing of Objection on the Aforesaid Grounds.** — It will be observed that the matter of the time when the objection is to be taken is of the essence of this matter of waiver. The rule is that it must be taken by the party aggrieved so soon as he becomes aware of the existence of the fact creating the incompetency. It is likened to the case of challenging a juror.<sup>5</sup> The party will not be allowed to lie by after he has attained the knowledge, and proceed with the hearing without objection, thereby accumulating expense and taking his chance

<sup>1</sup> Johnston v. Cheape, 5 Dow Parl. 247; Drew v. Drew, H. of L., March 8, 1855; cited in Russell on Arb., 3d ed. p. 106.

<sup>2</sup> Morgan v. Birnie, 9 Bing. 672.

<sup>3</sup> Owdy v. Gibbons, Comb. 100.

<sup>4</sup> Perry v. Moore, 2 E. D. Smith, 32. See Combs v. Wyckoff, 1 Caines, 147, cited *post*.

<sup>5</sup> Fox v. Hazelton, 10 Pick. 275.

of a decision in his favor, and then, at a later stage, or after a decision has been, or seems likely to be, rendered against him, for the first time produce and urge his objection.<sup>1</sup>

If the attorney of a party has assented to a person as referee in a pending cause, who is, without his knowledge, personally hostile to his client, it is the duty of the client within a reasonable time after learning the fact of the assent, to apply to the court to remove this referee and appoint another. Otherwise he will waive his right to object on this ground to the validity of the award.<sup>2</sup>

**A Party may be also an Arbitrator.**—Even the rule that a party cannot be a judge in his own cause, may be disregarded by parties in choosing an arbitrator. If two disputants agree that one of them shall finally determine the matter in issue, his award will be good, though it be in his own favor.<sup>3</sup>

Stewards of a horse-race are not disqualified from determining disputes by reason of their being interested by their own bets upon the race. For, it is said, parties must expect that very probably they will bet; and, moreover, they are not, strictly speaking, arbitrators.<sup>4</sup>

**Judge of Court as Referee.**—It seems that though a judge cannot appoint himself referee in a cause pending before him, yet he may by special agreement of parties act as such.<sup>5</sup> But parties cannot enter into a rule of reference before a justice by which he is himself named as referee.<sup>6</sup>

<sup>1</sup> *Brown v. Leavitt*, 26 Maine, 251; *Perry v. Moore*, 2 E. D. Smith, 32.

<sup>2</sup> *Combs v. Wyckoff*, 1 Caines, 147.

<sup>3</sup> *Matthew v. Ollerton*, 4 Mod. 226; Comb. 218; and see *Hunter v. Bennison*, Hardw. 43.

<sup>4</sup> *Ellis v. Hopper*, 28 L. J. Exch. 1; *Parr v. Winteringham*, 28 L. J. Q. B. 123; *Russell on Arb.*, 3d ed. p. 107.

<sup>5</sup> *Dinsmore v. Smith*, 17 Wis. 20; *Walworth County Bank v. Farmers' Loan and Trust Co.*, 22 id. 231 (in which, however, the custom is reprobated); *Davis v. Forshee*, 34 Ala. 107; *Galloway's Heirs v. Webb*, Hardin, 318. In the last case the court intimated an astute doubt as to whether or not they could judicially know that the persons named as arbitrators were identical with certain judges of the court who happened to bear the same names.

<sup>6</sup> *Drew v. Mullikin*, 5 N. H. 153.

If no proceedings are pending or contemplated in court, there is of course no objection to selecting a judge to act as an arbitrator under a submission *in pais*. On the contrary, it is very common so to do, and no objection has ever been made to the arrangement before any tribunal of authority.

If the parties submit a *lis pendens* to the judge of the court, he is an ordinary arbitrator acting *in pais*, and no writ of error will lie to his decision and award.<sup>1</sup>

**Arbitrators are Agents of the Parties.** — Arbitrators are considered to be the agents of both parties. Their acts are therefore equivalent to the acts of the parties themselves. Thus a balance found by them is substantially the same as a balance struck by the parties. It is true that the latter may be opened, explained, and corrected, and the former is final. "But this only proves that arbitrators are a more solemn kind of agents, through whose acts the parties may, if they please, estop themselves just as they may by their own acts" if they choose to release under seal.<sup>2</sup>

**They must be Impartial Agents of both Parties alike.** — But it is to be remembered that they are agents of *both* parties alike, and not of one party only. A single arbitrator, agreed upon by both disputants, is not likely to forget that he is to be an impartial judge. But where each party nominates an arbitrator, the nominee may sometimes be tempted to regard himself as specially bound to protect the interest of his appointer; the notion, however, is wholly wrong. Under no circumstances can an arbitrator become an advocate. He is always bound to exercise the highest degree of judicial impartiality, without the slightest regard to the manner in which the charge has been placed upon him.<sup>3</sup>

In *Calcraft v. Roebuck*,<sup>4</sup> Lord Thurlow said that by con-

<sup>1</sup> *Hughes's Adm'r v. Peaslee*, 50 Penn. St. 257.

<sup>2</sup> *Hays v. Hays*, 23 Wend. 363; *Browning v. Wheeler*, 24 id. 258; *Keen v. Batshore*, 1 Esp. 194.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 205.

<sup>4</sup> 1 Ves. Jr. 227.

sidering himself the agent of the person appointing him, the arbitrator would act against good faith and would break a most solemn engagement. So in *Featherstone v. Cooper*,<sup>1</sup> Lord Eldon said that arbitrators must understand that "they are acting corruptly, acting as agents;" meaning of course, as is shown by the context, acting as agents of *one party* in contradistinction to acting as agents of *both parties*.

**Impartiality is a Fundamental Requisite.** — From this rule as to agency, and indeed also from all the foregoing pages of this chapter, may be gathered the rule that the fundamental requisite in the arbitrator is impartiality. If partiality should reach the stage of fraud or misconduct, it is well established that the award would be thereby rendered void. But far short of these points there may exist a partiality which will unfit a person to fulfil the functions of an arbitrator. Judge Cushing said: "Like jurors impanelled for the trial of a cause, or judges on the bench, they [arbitrators] are invested *pro hac vice* with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality. And a judge, a juror, an arbitrator, should not only possess the quality of impartiality in fact, and have the conscience of it in the given case; he should moreover sedulously shun all the possibilities even of insensible bias. And though, therefore, arbitrators be nominated, one by each party, still they are not to consider themselves as representing separate parties, and the advocates of opposite sides, but as called on to execute a joint trust, and to look impartially at the true merits of the matter submitted to their judgment. In this Commonwealth . . . it has been held theoretically that arbitrators ought to be indifferent and impartial, both in sentiment and in action. . . . Therefore proof of bias and strong partiality on the part of an arbitrator would form a serious objection to the acceptance of an award. It would be no answer to the objection, that such referee did not discover undue partiality in the deliberations of the referees,

<sup>1</sup> 9 Ves. Jr. 67.

and made no unusual exertion to influence their minds, because it is impossible to determine to what extent their judgment might have reposed on his reasonings and suggestions, or how far their decisions were influenced by him.”<sup>1</sup> This language is almost a literal quotation of that used by Chief Justice Shaw in the earlier cause of *Fox v. Hazelton*,<sup>2</sup> wherein that distinguished jurist said that “proof of bias and of strong partiality would have formed a very serious objection to the acceptance of the report. . . . If parties really intend to have their rights decided by impartial judges, they are entitled to insist that all shall be impartial.”

The evidence in the last-named case was that one of the referees, both prior to and after his appointment, had repeatedly expressed himself as follows: “That the defendant ought to pay for getting the plaintiff indicted; that he had inquired into the business, and that the defendant was altogether in the wrong; that the defendant did it out of spite and malice; that he hoped the defendant would have to pay for it; that the plaintiff was a good man, but he thought otherwise of the defendant.” The court held that the partiality of this referee both before and at the hearing seemed to be sufficiently proved by this evidence.

The same rule is well established in England by several cases, in which it has been held that enmity existing in the mind of the arbitrator against a party, or his use of expressions indicative of bias or hostility, will suffice to render the award void, though the other arbitrators who have also joined in the award are above suspicion of partiality.<sup>3</sup>

Specific acts of the arbitrators, such as the receipt of money, or private consultations with a party, and the like, raising a

<sup>1</sup> *Strong v. Strong*, 9 Cush. 560.

<sup>2</sup> 10 Pick. 275.

<sup>3</sup> *Earle v. Stocker*, 2 Vernon, 251; *Burton v. Knight*, ib. 515; *Bac. Abr. Arb. K.*; *Parker v. Burroughs*, *Colle's Parl. Ca.* 257; *Ward's Case*, cited in 2 *Atk.* 155, 396; *Chicot v. Lequesne*, 2 *Vesey, Sen.* 315; *Russell on Arb.*, 3d ed. p. 109.



suspicion of partiality, constitute misconduct, and will be considered hereafter under that head.

**Officials as Arbitrators.** — It often happens that persons filling official positions are called upon to act as arbitrators in their official capacity. Thus commissioners are often named by statute for such duties. But in the absence of a statute the intent to submit to them in this official capacity must be clearly apparent, otherwise they will act as individuals only; as in the following case. A submission was made to certain persons who, as matter of fact, constituted or were the members of "the Committee of Arbitration of the Board of Trade of the City of Portland." Of this official character, the submission by its language took no notice; but in the award the arbitrators styled themselves "*as such Committee*," &c. It was held that, especially since no objection had been taken at the hearing to the method of procedure, the arbitrators were not bound to conduct it in accordance with the rules and regulations of the Board of Trade; that the submission was to them as individuals, not in their official capacity.<sup>1</sup>

**Public Commissioners are amenable to the Court.** — Where commissioners, acting under a statute, make a report in the nature of an award, it seems that it will be treated by the courts as an award; and if the commissioners are appointed by the court, they must return the award to it. A statute provided that upon petition by either one of connecting railroad corporations, the Supreme Court should appoint commissioners to determine the terms upon which each corporation should carry the passengers and freight of the other. The court said that although the statute contained no express provision concerning the publication of the award of the commissioners, or requiring them to make any return of their doings into the court from which their commission issued, yet it necessarily became their duty to do so, in order that it might be known whether they had exercised the authority conferred upon them.

<sup>1</sup> *Stewart v. Waldron*, 41 Maine, 486.

They derived all their right and power to act in the premises at all from their judicial appointment. The court, therefore, would so far supervise and control their proceedings as to see that, in discharge of the duties imposed upon them, they had acted within the scope of their authority, and neither exceeded nor failed to exercise the full measure thereof. In short, their report was treated as an award, subject to be sustained or rejected according to the ordinary rules of law governing awards.<sup>1</sup>

**Absence of Person named as Arbitrator.**—The absence in Europe of a person named as arbitrator, has been held to be sufficient proof of his inability to act to justify the appointment of a substitute in the manner provided for that purpose in the submission.<sup>2</sup>

And see *post*, under “Adjournment,” *Harrington v. Rich*, 6 Vt. 666.

**Administration of Oath to Arbitrator.**—The rule at common law is that an arbitrator or referee chosen by agreement of parties need not be sworn.<sup>3</sup> And this is so, even though he be clothed by the agreement with all the powers appurtenant to another description of officer whom the statute requires to act under oath.<sup>4</sup> For in the latter case, as in the former, he derives his authority from the voluntary selection of the parties, by which they express their confidence in him and a willingness to abide his decision without an oath.

**Statutory Provisions concerning Arbitrator's Oath.**—Statutes providing for arbitrations usually declare that the arbitrators may or shall be sworn. When submissions fall within the statutory provisions, it has become a question of frequent occurrence whether the direction that an oath shall be administered is imperative or merely permissive; that is to say, whether the administration of the oath is indispensable, or whether it is a

<sup>1</sup> *Boston & Worcester Railroad Co. v. Western Railroad Co.*, 14 Gray, 253.

<sup>2</sup> *Binsse v. Wood*, 47 Barb. 624.

<sup>3</sup> *Bradstreet v. Erskine*, 50 Maine, 407; *Daggy v. Cronnelly*, 20 Ind. 474.

<sup>4</sup> *Ibid.*

mere extraordinary safeguard furnished for the protection of the parties, and of which they may or may not avail themselves at their pleasure. The rule has been differently declared in different States. By some tribunals, the power on the part of the parties to waive the formality has been asserted ; by others it has been denied.

In Louisiana and New Jersey, the statute requires the arbitrator to be sworn, and the swearing is indispensable.<sup>1</sup> All must be sworn, though a majority may make the award.<sup>2</sup>

In New York and Vermont, the parties may dispense with the oath of either arbitrators or witnesses.<sup>3</sup> And it is held that they do so dispense with it by proceeding with the hearing when the oath has not been administered.<sup>4</sup> This evidence of waiver is declared to be conclusive.<sup>5</sup>

**Effect of Neglect to administer Oath.**—It is further held in New York that the objection that an arbitrator has not been sworn, even when available as a defence at all, is merely technical. A court of equity will not open a regular order to close the proofs and a decree founded thereon, solely to allow a party to introduce such an objection to the validity of the award. On the contrary, even if other causes should render it proper to open the order to close the proofs, it is said that there should be a special restriction against the introduction of any evidence going to sustain this technical objection.<sup>6</sup>

Under a New York statute requiring a referee to be sworn, the court held that he acquired jurisdiction from the order of the court, even though the oath was not administered to him,

<sup>1</sup> *Overton v. Alpha*, 13 La. An. 558 ; *Inslee v. Flagg*, 2 Dutcher, 368 ; *Combs v. Little*, 3 Green Ch. 310 ; *Bowen v. Lanning*, 1 Penning. 139 ; *Reeves v. Goff*, ib. 143 ; *Parker v. Crammer*, ib. 271 ; *Little v. Silverthorne*, 2 id. 680 ; *Crammer v. Mathis*, ib. 550 ; *contra*, but overruled, *Ford v. Potts*, 1 Halst. 393.

<sup>2</sup> *Deputy v. Betts*, 4 Harrington, 352.

<sup>3</sup> *Woodrow v. O'Connor*, 28 Vt. 776 ; *Browning v. Wheeler*, 24 Wend. 258 ; *Howard v. Sexton*, 1 Denio, 440 ; 4 Comst. 157.

<sup>4</sup> *Sloan v. Smith*, 1 Denio, 440.

<sup>5</sup> *Winship v. Jewett*, 1 Barb. Ch. 173.

<sup>6</sup> *Ibid*.

and that the neglect was an irregularity merely, and could be the subject only of a motion.<sup>1</sup>

• In California, where the statute does not require referees to be sworn, it is held that though the oath be administered to them by the court, they will not be amenable for breaking it.<sup>2</sup>

**Form of Oath.**—No especial form of oath is necessary unless it be prescribed by statute. An oath substantially following any form which may be thus prescribed will be regarded as sufficient.<sup>3</sup>

**Dispensing with Oath.**—Where a statute required that referees should be sworn, unless the parties dispensed with the oath, “to try and determine the cause referred to them, and a just award make out under the hands and seals of a majority of them,” it was held that if the parties dispensed with the oath they also dispensed with the sealing.<sup>4</sup>

**Presumption concerning the Oath.**—The presumption is always in favor of regularity and sufficiency in the matter of the oath. Thus if it be proper to swear the arbitrators, the presumption, at least until the contrary is affirmatively shown, is that they were sworn.<sup>5</sup> And if the award state that they were sworn “before J. S.,” it will be presumed that he was authorized to administer the oath.<sup>6</sup>

But in Kentucky the fact of the swearing must appear in the award.<sup>7</sup> In New Jersey it is said the fact should properly appear on the record;<sup>8</sup> but it is sufficient if it be stated in the award.<sup>9</sup>

<sup>1</sup> *People v. McGinnis*, 1 Parker Crim. Ca. 387.

<sup>2</sup> *Sloan v. Smith*, 3 Cal. 406.

<sup>3</sup> *Vaughn v. Graham*, 11 Mis. 575.

<sup>4</sup> *Graham v. Hamilton*, 1 Binn. 461.

<sup>5</sup> *Browning v. Wheeler*, 24 Wend. 258.

<sup>6</sup> *Shryock v. Morton*, 2 Marsh. 563.

<sup>7</sup> *French v. Moseley*, 1 Litt. 248; *Lile v. Barnett*, 2 Bibb, 167.

<sup>8</sup> *Reeves v. Goff*, 1 Penning. 143; *Parker v. Crammer*, ib. 271; *Little v. Silverthorne*, 2 id. 680; *Crammer v. Mathis*, ib. 550; *Bowen v. Lanning*, 1 Penning. 139; *Ford v. Potts*, 1 Halst. 388.

<sup>9</sup> *Swayze v. Kerkendall*, 2 Penning. 660.

**Pleading concerning the Oath.** — In suit on the award it is not necessary to allege that the arbitrators were sworn, at least if the award is averred to have been made by “qualified arbitrators.” The analogy is traced between this tribunal and a bench of judges.<sup>1</sup>

Whether it can be shown collaterally by plea in an action on the award that the oath was omitted is said to be another question, but one which, from the same analogy, must be answered in the negative, though the swearing may have been necessary. For as it cannot be pleaded in an action on a judgment that the judges were not sworn, so must it be also, *a fortiori*, in the case of judges *de facto* of the parties’ own choosing, and who have acted within the scope of their authority.<sup>2</sup>

**Swearing the Umpire.** — The swearing of the umpire is equally necessary with the swearing of the arbitrators.<sup>3</sup>

<sup>1</sup> *Browning v. Wheeler*, 24 Wend. 258.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Frissell v. Fickes*, 27 Mis. 557.

## CHAPTER V.

### PROCEEDINGS IN THE ARBITRATION.

The arbitrator controls the mode of conducting the reference.  
The arbitrator must appoint the time and place for hearing.  
Parties entitled to be present.  
Notice of hearing must be given to each party.  
Of what meetings notice need be.  
Notice after choice of third arbitrator.  
No notice to surety.  
Notice to attorney of party.  
Revocation of appointment for hearing.  
Sufficiency of notice.  
Waiver of notice.  
Non-attendance of party after notice.  
Parties must have time to examine written evidence.  
Pleading concerning notice.  
Availing of the objection of want of notice.  
Exceptions to rule requiring notice.  
*Ex parte* hearings.  
Private statements and examinations.  
Duty of party objecting to private examination.  
Curing objection on ground of improper receipt of evidence.  
Attendance of counsel, advisers, &c.  
Arbitrator's discretion to hear counsel.  
Arbitrator's right to call in counsel.  
Administration of oaths to witnesses.  
Unauthorized administration of oath.  
Parties may dispense with the oath.  
Arbitrator's power to force attendance of witnesses and production of documents.  
Protection of witnesses.  
Rules governing arbitrator respecting admission of evidence.  
His decision is final.  
Rejection of evidence under mistake concerning the scope of the submission.  
Erroneous ruling on evidence by a referee.  
The referee may leave the question of admissibility to the court.  
A referee need not report evidence.  
Parties may be admitted as witnesses.  
Arbitrator's discretion to refuse to hear evidence.  
Number of witnesses.  
Closing case too hastily.  
Opening case for new evidence.

Admission of evidence *de bene esse*.

Adjournments are in arbitrator's discretion.

Adjournments before referee in *lis pendens*.

Death of witness during adjournment.

Record of adjournment.

Causes for demanding adjournment.

Erroneous refusal to adjourn.

Adjournments in case of absence.

All the arbitrators must act together during the proceedings.

Withdrawal or refusal of an arbitrator to act with his fellows.

The refusal or withdrawal must be distinct and final.

But it need not be formal.

Rule where a third arbitrator is called in.

Withdrawal or refusal before the proceedings are begun.

Refusal or withdrawal after recommitment.

Silence of award concerning joint action.

The rule that all the arbitrators must unite in the award.

Award by majority.

The rule concerning referees.

Time of expressing dissent.

Unanimity in each incidental question is unnecessary.

Process of coming to agreement.

Some judicial discretion must be exercised.

Delegation of authority by an arbitrator, and agreements to accept the decision of another.

Delegation of purely ministerial acts or functions.

Waiver of right to object for incompetency or irregularity.

by appearing and proceeding.

of stipulation as to time.

is matter of apparent intention.

of stipulations concerning the form of the award.

by ratification and performance.

of departure from the scope of the submission.

**The Arbitrator controls the Mode of conducting the Reference.** — "The mode in which\*the reference is to be conducted depends entirely upon the arbitrator. The courts will not review his discretion provided he acts according to the principles of justice, and behaves fairly to each party."<sup>1</sup> Though, as will appear hereafter, his discretionary power in conducting the case is not so absolute but that it may be reviewed by the courts, and his award set aside, if he appears to have abused his authority, or even if, though acting in perfect good faith, he

<sup>1</sup> Russell on Arb., 3d ed. p. 164; Tillam v. Copp, 5 C. B. 211; Hewlett v. Laycock, 2 Car. & Payne, 574; Haigh v. Haigh, 31 L. J. Chy. 420.

has, nevertheless, treated a party with serious and injurious unfairness. For the question of the honesty of his intent or his *bona fides* is in this connection a matter of indifference. The point is, whether or not in fact he has so failed in the performance of his duty that a party has been prejudiced thereby.<sup>1</sup>

**The Arbitrator must appoint the Time and Place for Hearing.** — The time and place of meeting for hearing may be appointed by the arbitrators or referees at their own discretion,<sup>2</sup> unless an express stipulation to a contrary effect be actually embodied in the submission or rule of reference. A Connecticut case covers this ground very fully and satisfactorily. At the time of the appointment of referees, the parties came to an understanding not embodied in the rule of reference, that they would subsequently determine upon a time and place of hearing convenient to each of them. At a later day they did accordingly determine upon such time and place, and notified the referees. One of the referees did not attend. Another effort to meet proved equally unavailing. Finally the referees, at the request of the defendants, named a time and place, and gave sufficient notice thereof to the plaintiffs. The plaintiffs, in return, notified the referees that they could not and should not be ready. The referees, nevertheless, met according to the appointment, and in the absence of the plaintiffs proceeded to hear the defendants *ex parte*. The court said: "The agreement respecting the time of meeting for a hearing by the referees was no part of the submission, and, as such, cannot be noticed by the court; but if it was made use of to practise a fraud; and while the plaintiffs relied upon it, the defendants in violation of it procured the referees to notify a meeting when the plaintiffs were absent or under such circumstances that they could not have a fair trial, it might then be considered as a ground for setting aside the award. But in this case it appears that actual notice was given to the plaintiffs; and it was in their power to

<sup>1</sup> Haigh v. Haigh, 31 L. J. Chy. 420; Knowlton v. Mickles, 29 Barb. 465.

<sup>2</sup> Russell on Arb., 3d ed. p. 164; Fetherstone v. Cooper, 9 Ves. Jr. 67.



have *attended*, and for any proper cause moved the referees to postpone the hearing." If they suffered any damage, it was imputable only to their own neglect in failing to make such proper application to the referees. "If no provision is made to the contrary, it is incidental to the power of referees or arbitrators to appoint the time and place of trial, and to proceed therein according to their discretion." The *ex parte* proceedings in this case were accordingly sustained as valid.<sup>1</sup>

**Parties entitled to be present.** — Each party is not only entitled to present his own case, both by evidence and argument before the arbitrators, but he is also entitled to be present whenever witnesses or arguments are heard on behalf of his opponent.<sup>2</sup>

**Notice of Hearing must be given to each Party.** — Hence arises the necessity that each party should have notice of the time and place appointed for hearing, and that such notice should be served upon him sufficiently long before the time named to give him due and reasonable opportunity for preparing his case for presentation.<sup>3</sup> There seems to be some difference between the manner in which it is customary and proper to give this notice in England and the method pursued in this country. Russell says: "In general, soon after the submission is made, the party who wishes to go on with the reference will call upon the arbitrator, deliver to him the submission, and request him to appoint a meeting." If a day convenient for all parties cannot be agreed upon, and "it be necessary for the arbitrator to make the appointment, he generally gives to the party applying for it a written appointment, specifying the time and place at which the parties and their witnesses are to appear. The party obtaining the written appointment should serve a copy of it on his opponent without delay, or at least within a reasonable time before the day of meeting."<sup>4</sup>

<sup>1</sup> *Bray v. English*, 1 Conn. 498. So also *Fetherstone v. Cooper*, 9 Ves. 67.

<sup>2</sup> *Hollingsworth v. Leiper*, 1 Dall. 161; *Hagner v. Musgrove*, ib. 83; *Chaplin v. Kirwan*, ib. 187; *Herrick v. Blair*, 1 Johns. 101.

<sup>3</sup> Russell on Arb., 3d ed. p. 165.

<sup>4</sup> *Ibid.*

In the United States, the duty of giving notice of the time and place of hearing seems to belong to the arbitrators. They have it in charge to see that sufficient notification is made to each party, though the manner in which it shall be made, whether according to the English method or any other, may apparently be selected by them at their own option. It is the fact of notice which alone appears to be essential; and the numerous cases which strenuously assert this rule are generally silent as to the method or person in which or by whom the notice is to be given.<sup>1</sup>

The necessity that by some means or other sufficient notice should be actually brought home to all parties, is absolutely imperative. If there has not been such notice, there cannot be a legal hearing nor a valid award.<sup>2</sup> This rule is probably without exception.

**Of what Meetings Notice need be.**—The notice need be only of meetings at which evidence or arguments are to be heard. Notice of the meetings of the arbitrators for the purposes of deliberation and making up the award need not be notified, since the parties are not expected to attend, and indeed ought not to be allowed to attend, at such conferences.<sup>3</sup>

But at any meeting at which there are to be proceedings, not perhaps constituting a regular hearing, but having the substantial effect of a hearing, and including the admission of testimony or statements concerning the matter in dispute, notice to both parties is indispensable. It was so held where the arbitrators examined the premises in dispute, one party

<sup>1</sup> *Lutz v. Linthicum*, 8 Peters, 178; *Elmendorf v. Harris*, 23 Wend. 628; *Peters v. Newkirk*, 6 Cow. 103; *Young v. Reynolds*, 4 Md. 375; *McKinney v. Page*, 32 Maine, 513; *Brown v. Leavitt*, 26 id. 251; *Bullitt v. Musgrave*, 3 Gill, 31; *Rigden v. Martin*, 6 Har. & J. 403; *Webber v. Ives*, 1 Tyler, 441; *Bushey v. Culler*, 26 Md. 534; *Morewood v. Jewett*, 2 Robertson, 496. But see *Hill v. Hill*, 11 Sm. & Mar. 616.

<sup>2</sup> *Conrad v. Massasoit Insurance Co.*, 4 Allen, 20; *Braddick v. Thompson*, 8 East, 344; *Jordan v. Hyatt*, 3 Barb. 275, and cases cited in the next preceding note.

<sup>3</sup> *Roloson v. Carson*, 8 Md. 208. The same rule was apparently adopted in *Lutz v. Linthicum*, 8 Peters, 178.

only being present, and made various inquiries and listened to various statements from different persons as to their knowledge of the damage claimed by the party present, and as to the cause thereof.<sup>1</sup>

Even where the arbitrator was permitted to "collect all the evidence he can and show it to the parties before he decides, and that then either party may add what he can," and the arbitrator may then decide, notice and opportunity to be heard was declared to be necessary to be given to the parties.<sup>2</sup>

If nothing is done at a meeting save to arrange an adjournment, the want of proper notice to a party of that meeting will be immaterial.<sup>3</sup>

**Notice after Choice of Third Arbitrator.**—It has been held in Maryland, that where two arbitrators fail to agree, and, in pursuance of an authority given them by the submission, name a third, notice should be given to the parties of the day fixed for the meeting of the two original arbitrators with the third;<sup>4</sup> and this was so held in spite of the fact that all the evidence in the case had been reduced to writing.

**No Notice to Surety.**—A surety upon a submission is not entitled to notice of the hearing.<sup>5</sup> Neither is a surety on a lease which becomes the subject-matter of arbitration by virtue of a provision to that effect embodied in it.<sup>6</sup>

**Notice to Attorney of Party.**—Notice to the attorney of a party must be usually regarded as equivalent to notice to the party, though an old case in Pennsylvania is to the contrary effect, and declares that notice must be served on the party himself and not on his attorney, unless otherwise specially provided in the rule of reference.<sup>7</sup>

<sup>1</sup> *Knowlton v. Mickles*, 29 Barb. 465.

<sup>2</sup> *Goodall v. Cooley*, 9 Foster, 48.

<sup>3</sup> *In re Morphett*, 2 Dowl. & Low. 967.

<sup>4</sup> *Selby v. Gibson*, 1 Har. & J. 362, note. See *Lutz v. Linthicum*, 8 Peters, 165.

<sup>5</sup> *Farmer v. Stewart*, 2 N. H. 97.

<sup>6</sup> *Binsse v. Wood*, 47 Barb. 624.

<sup>7</sup> *Rivers v. Walker*, 1 Dall. 81.

**Revocation of Appointment for Hearing.** — After a time and place of hearing have been named and the parties have been notified thereof, it is still in the power of the arbitrator, and for good cause it may become his duty, to revoke the appointment. If he be asked by either party to make such revocation, he may, at his discretion, grant or refuse the request.<sup>1</sup> He has the same power in this as in other matters concerning the conduct of the proceedings.

**Sufficiency of Notice.** — The notice, it has been already said, must be given sufficiently long before the hearing to give the parties reasonable time to prepare for trial.<sup>2</sup> What will be regarded as such reasonable notice is a matter regulated by no arbitrary rule of law. It is necessarily left, in each case, very much within the discretion of the arbitrator. It has been said that if he acts in good faith, it will be sufficient, since his action is within the authority conferred upon him by the submission; and his award will be valid at law though he actually mistakes the true rule as to what is reasonable notice.<sup>3</sup> But another case takes a different view, and declares that the question, whether or not reasonable notice was given, is one properly to be determined by a jury in view of the circumstances in each case.<sup>4</sup>

The notice must be given before the arbitrators have examined into the subject in controversy and come to a determination upon it. In a case where no notice was sent until after the arbitrators had "substantially agreed upon the amount" of their award, it was held a sufficient ground for declaring the award void. The court said: "The object of a notice is to give an opportunity to the parties to present their case to the arbitrators before a conclusion is arrived at. It is an idle

<sup>1</sup> Russell on Arb., 3d ed. p. 165; *Eastham v. Tyler*, 2 Bail. Court Rep. 136.

<sup>2</sup> *Emerson v. Udall*, 8 Vt. 357; *Morewood v. Jewett*, 2 Robertson, 496; *Russell on Arb.*, 3d ed. p. 165.

<sup>3</sup> *Elmendorf v. Harris*, 23 Wend. 628.

<sup>4</sup> *Emerson v. Udall*, 8 Vt. 357.

ceremony if given after the judgment of the arbitrators is formed.”<sup>1</sup>

**Waiver of Notice.**—The right to, or necessity for, notice may be waived or dispensed with by a party.<sup>2</sup>

The mere fact that a party declares his intention not to appear, may not constitute a waiver of notice of the time and place of hearing. But where a party asserted to an arbitrator that by advice of counsel he would not appear before the umpire, and handed to the arbitrator a paper to be laid before the umpire, it was held that his conduct amounted to a waiver of notice.<sup>3</sup>

If a party has received a notice which he regards as insufficient or as not allowing him reasonable time, it will be better for him to attend, if possible, at the time and place appointed, to state his objection and to protest against proceeding then and there. It is not, however, absolutely essential for him to do so. The fact of sufficiency or insufficiency is the important matter. If the notice was insufficient, the hearing will be none the less invalid though he entirely absents himself. If, on the other hand, the notice is sufficient, his absence, though under a *bona fide* belief to the contrary, will not operate to avoid the award.

**Non-attendance by Party after Notice.**—No party, of course, can practically avoid the submission or prevent the arbitrators from proceeding to hear and to award, simply by contumaciously refusing to attend. “Every arbitrator is authorized by the nature of his office to proceed *ex parte* for good cause.”<sup>4</sup> The sufficiency of the occasion may be judged of by him-

<sup>1</sup> Conrad v. Massasoit Insurance Co., 4 Allen, 20.

<sup>2</sup> Hill v. Hill, 11 Sm. & M. 616, where the attorneys of the parties acted as arbitrators; Harding v. Wallace, 8 B. Monr. 536, where a non-resident party was represented by counsel at the hearing; Shockey's Adm'r v. Glasford, 6 Dana, 9, where there was a specific agreement of parties; Hewlett v. Laycock, 2 Car. & Payne, 574; Kingwell v. Elliott, 7 Dowl. 423.

<sup>3</sup> Graham v. Graham, 9 Penn. St. (Barr) 254.

<sup>4</sup> Russell on Arb., 3d ed. p. 191.

self,<sup>1</sup> though it is said that a very strong justification should subsist.<sup>2</sup>

Russell lays down the English rule to be that if after the party has been summoned he neglects to attend, and the arbitrator is of opinion from circumstances brought to his notice that the absence arises out of a desire to prevent justice and defeat the object of the reference, then the arbitrator ought to give due notice of a meeting to be held at a subsequent day. If the absentee fails to attend according to such second notification, or to furnish some reasonable excuse, then the arbitrator is bound to proceed *ex parte*.<sup>3</sup> And the general rule is said to be that the arbitrator "is not justified in proceeding *ex parte* without giving the party absenting himself due notice," either verbal or written, clearly setting forth the arbitrator's intention to proceed.<sup>4</sup> Making an ordinary appointment "peremptory," is said to satisfy this requisition.<sup>5</sup> But it has been said that even the second appointment ought to be marked "peremptory," or otherwise designated as having this character.<sup>6</sup> Certainly there is no lack of tenderness displayed in these doctrines as towards the delinquent party.

Two later cases are somewhat less stringent. In an action against a tenant for dilapidations, the arbitrator appointed a meeting for a view and "to go into the reference." The defendant was present at the view, and then withdrew without saying any thing. The arbitrator proceeded *ex parte*, and the court refused to vacate his award.<sup>7</sup>

<sup>1</sup> Wood v. Leake, 12 Ves. Jr. 412; Hetley v. Hetley, cited in Kyd on Awards, p. 100.

<sup>2</sup> Gladwin v. Chilcote, 9 Dowl. 550.

<sup>3</sup> Waller v. King, 9 Mod. 63; Wood v. Leake, 12 Ves. Jr. 412; *In re Hall v. Anderton*, 8 Dowl. 326; Russell on Arb., 3d ed. pp. 191, 192.

<sup>4</sup> Gladwin v. Chilcote, 9 Dowl. 550; Scott v. Van Sandau, 6 Q. B. 237; Russell, *loc. cit.*

<sup>5</sup> Gladwin v. Chilcote, *supra*; Doddington v. Hudson, 1 Bing. 384.

<sup>6</sup> Gladwin v. Chilcote, *supra*.

<sup>7</sup> Tryer v. Shaw, 27 L. J. Exch. 320. See Angus v. Smythies, 2 Fost. & Fin. 381; Hewitt v. Portsmouth Waterworks Company, 10 W. R. 780.

So where a party said to the arbitrator, "I will not attend, because you are receiving illegal evidence, and no award you can make will be good," it was held not only that the arbitrator might proceed at that hearing *ex parte*, but that it was not necessary that this party should be notified of subsequent hearings; though it was said it would be well to give him such notice, in order to furnish him the opportunity to change his mind.<sup>1</sup>

But if a party has ineffectually attempted to revoke a submission, and refused to attend a meeting on the ground of the arbitrator having no authority to proceed, it is well settled that the arbitrator may proceed forthwith *ex parte*.<sup>2</sup>

In Connecticut it has been held that if, after a party has received sufficient notice of the time and place of hearing, he neglects to attend, the arbitrator or referee may proceed with the hearing *ex parte*.<sup>3</sup>

So also in Maine, where a party who had been notified and had "the fullest opportunity" to attend and be heard, neglected to appear and then objected to the award on the ground of an *ex parte* hearing, the court said, "to give effect to this objection would be tantamount to a revocation of a submission which the law has not contemplated could be so done."<sup>4</sup>

**Parties must have Time to examine Written Evidence.**—It is the duty of the arbitrators to give to each party sufficient time and opportunity to examine any documentary evidence put into the case by his opponent. The duty is akin to that of notifying the party to be present at the hearing of oral testimony, and the neglect to perform it will be equally fatal to the validity of the award.<sup>5</sup>

<sup>1</sup> *Scott v. Van Sandau*, 6 Q. B. 237; *Harcourt v. Ramsbottom*, 1 Jac. & Walk. 512; *Bignall v. Gale*, 2 Man. & Gr. 830; *In re Kyle*, 2 Jur. 760.

<sup>2</sup> *Harcourt v. Ramsbottom*, 1 Jac. & Walk. 512.

<sup>3</sup> *Bray v. English*, 1 Conn. 498.

<sup>4</sup> *Brown v. Leavitt*, 26 Maine, 251.

<sup>5</sup> *Passmore v. Pettit*, 4 Dall. 271. And see *Harvey v. Shelton*, 7 Beav. 455; 13 L. J. Chy. 466.

The receipt of a document after the hearing had been closed was sustained in the following case.<sup>1</sup> After the hearing was over the plaintiff told the defendant in the presence of the arbitrator that a certain document was in existence. The defendant doubted it. All three then went to the office of one S. to get it. S. was not in his office, and the paper was not obtained. The arbitrator thereupon expressed a wish to see it, and the plaintiff said, "We will get it." The plaintiff did afterwards get it and sent it to the arbitrator, who did not notify the defendant of the fact, but proceeded to make his award. The arbitrator testified that defendant was present when plaintiff promised to get the document, but did not say that when the document should be produced he wished to be heard upon it. The case had already been closed, and the parties had stated that they had nothing more to say. The court held that the award should stand.

**Pleading concerning Notice.**—The award need not aver notice.<sup>2</sup> Whether or not in suit on an award which does not itself state the fact of notice, an averment to that effect should be made, is left in some doubt by the decisions. It has been held that the allegation is necessary in Maryland; though it is acknowledged in the same opinion that want of notice will never be presumed.<sup>3</sup> On the other hand, in New York it is said that notice will be presumed, though not averred or proved.<sup>4</sup>

**Availing of the Objection of Want of Notice.**—In the same State, in another suit brought on an arbitration bond, the defendant simply pleaded want of notice, and that consequently neither he nor his witnesses had been heard. The right to avail of this fact in this manner was questioned, but the court sustained the sufficiency of the plea. Chancellor Walworth said that the validity of the award was in this case a purely legal

<sup>1</sup> Winsor v. Griggs, 5 Cush. 210.

<sup>2</sup> Rigden v. Martin, 6 Har. & J. 403; Webber v. Ives, 1 Tyler, 441; Mayor, &c., of New York v. Butler, 1 Barb. 325.

<sup>3</sup> Bullitt v. Musgrave, 3 Gill, 31.

<sup>4</sup> Mayor, &c., of New York v. Butler, 1 Barb. 325.



question, proceeding on the ground that the arbitrator was powerless to award without hearing the parties. It was unreasonable to compel the party who had been prejudiced by the *ex parte* proceeding to go into a court of chancery for relief, instead of allowing him to assert the invalidity of the award in the action instituted against him in a court of law, though it was said that perhaps the court of chancery might have a concurrent jurisdiction.<sup>1</sup>

If no notice is in fact given, and therefore no due and sufficient hearing is had, the proper mode for bringing the fact before the court, provided it does not appear on the face of the award, has been said to be by affidavit and motion to set aside the award.<sup>2</sup>

The practice in Maryland would seem to be that the party seeking to defend in a suit at law on the ground of want of notice, should move to set aside the award for this cause, and support his motion by affidavit.<sup>3</sup>

**Exceptions to Rule requiring Notice.**—The general rule that each party should have notice to enable him to be present when any thing is to be said on behalf of the other, is subject to reasonable exceptions. For example, where, after the hearing had been concluded, and the arbitrators were together for deliberation, and differed as to what had been the testimony of a certain witness on a certain point, they recalled him and again examined him upon this point without notice to the parties, the court held that it was no cause for interference with the award. It did not constitute misconduct. The witness was only called to *explain* his own testimony, and it was not alleged that he deposed differently as to any fact from

<sup>1</sup> *Elmendorf v. Harris*, 23 Wend. 628. And see *Peters v. Newkirk*, 6 Cow. 103; *Mayor, &c., of New York v. Butler*, 1 Barb. 325. To the same purport seem also to be *Maynard v. Frederick*, 7 Cush. 247; *McKinney v. Page*, 32 Maine, 513. The New York Code established the rule in that State, that in suit at law on an award the defendant may set up any fact sufficient to vacate the award, and pray an affirmative judgment to that effect; *Knowlton v. Mickles*, 29 Barb. 465.

<sup>2</sup> *Lutz v. Linthicum*, 8 Peters, 165.

<sup>3</sup> *Young v. Reynolds*, 4 Md. 375; *Rigden v. Martin*, 6 Har. & J. 403.

what he meant to have testified, and to have been understood to testify, on the first examination. The case is distinguished from that of an *ex parte* examination of witnesses, which is characterized as "unfair, partial, and a gross misconduct."<sup>1</sup>

**Ex parte Hearings.**—In discussing the subject of notice some cases have been mentioned in which the arbitrator may be allowed to proceed *ex parte*. Other circumstances may also occur which will confer upon him the like authority; but these will be very exceptional. The rule of requiring him to hear nothing on behalf of either party, unless the other party is present or has distinctly assented to his doing so, is generally very rigidly enforced. "The smallest irregularity," says Russell, "is often fatal to the award."<sup>2</sup>

It will make no difference in this respect whether or not the arbitrator shall swear that the testimony, improperly received by him in the absence of a party, or of both parties, had no influence upon his decision. He will not be allowed to determine upon this matter.<sup>3</sup>

Neither does it make any difference that the arbitrator acted from unimpeachable motives in making some inquiry, though from one of the witnesses introduced at the hearing, after the hearing has been closed and in the absence of both parties.<sup>4</sup>

Though Russell says that "at the present day, if no personal misconduct or evil intention or gross disregard of proper rules be imputable to the arbitrator, the courts will often refer back

<sup>1</sup> *Herrick v. Blair*, 1 Johns. Ch. 101. And see *Innes v. Miller*, 1 Dall. 188; *Anderson v. Wallace*, 3 Cl. & Fin. 26, cited *post*, in the paragraphs concerning "*Ex parte* hearings."

<sup>2</sup> Russell on Arb., 8d ed. p. 184; *Drew v. Drew*, House of Lords, March 8, 1855, given in Russell, *loc. cit.*

<sup>3</sup> *Walker v. Frobisher*, 6 Ves. Jr. 70; *Fetherstone v. Cooper*, 9 id. 67; *Dobson v. Groves*, 6 Q. B. 637; *Plews v. Middleton*, 6 Q. B. 845, overruling the contrary doctrine asserted in *Atkinson v. Abraham*, 1 Bos. & P. 175, and *Big-nall v. Gale*, 2 Man. & Gr. 830.

<sup>4</sup> *Dobson v. Groves*, 6 Q. B. 637; but see *Herrick v. Blair*, 1 Johns. Ch. 101, *ante*, pp. 125, 126.

the award to him, notwithstanding he may have been guilty of some irregularities in the examination of the witnesses.”<sup>1</sup>

It makes no difference that the party who objects to an award on the ground that a witness on behalf of the other party has been examined in his absence and without notice to him, has himself been guilty of a like irregularity in privately communicating with the arbitrator.<sup>2</sup> It is not a case for balancing irregularities.

Again, where referees, having determined upon the principles of their report, sent for one of the parties and asked him whether he would consent that a quarter's rent, accrued after suit brought, should be included in the settlement, it was held not to be such misbehavior as would invalidate the report.<sup>3</sup>

An arbitrator may properly take the evidence of a sick or infirm person at the residence of that person.<sup>4</sup>

Where the arbitrators called in a party, and in the absence of his opponent asked him simply whether he admitted or disputed certain items in an account, it was held not to be an irregularity which would avoid the award.<sup>5</sup>

Another old case asserts that referees may make inquiry abroad to ascertain, for their own satisfaction, the price of work or the truth of any other matter which may be said, comparatively, to be of a public nature. This, it is said, “so far from being irregular, would be highly commendable.” It is a “very different case” from proceeding separately to examine a witness who has been produced by one of the parties, although the evidence relates only to the like points of a general nature. The adverse party is entitled to cross-examine *a witness*.<sup>6</sup> This is akin to the privilege, hereafter to be discussed, which arbitrators have of availing themselves of the

<sup>1</sup> Russell on Arb., 3d ed. p. 186 ; *Anning v. Hartley*, 27 L. J. Exch. 145.

<sup>2</sup> *Harvey v. Shelton*, 13 L. J. Chy. 466 ; 7 Beav. 455.

<sup>3</sup> *Innes v. Miller*, 1 Dall. 188.

<sup>4</sup> *Tillam v. Copp*, 3 C. B. 211.

<sup>5</sup> *Anderson v. Wallace*, 3 Cl. & Fin. 26.

<sup>6</sup> *Chaplin v. Kirwan*, 1 Dall. 187.

services and opinions of persons who are experts or peculiarly cognizant of the subject-matter in dispute, without notifying either party of their intention to do so.

**Private Statements and Examinations.**— Under a submission to two jointly, the admissions of one party made to one of the referees singly, and by him reported to the other, ought not to be taken into consideration.<sup>1</sup>

It has been held that circumstances may arise in which, in order to subserve the ends of justice, the arbitrator may be justified in excluding both the parties and their counsel from the hearing, and in examining the witnesses by himself in their own houses.<sup>2</sup> But Mr. Russell, commenting upon this ruling, says very truly that “it is apprehended the circumstances must be very peculiar to authorize a proceeding at first sight so irregular.”<sup>3</sup>

Where upon a reference it was arranged that the books should be referred to an accountant, but open to the examination of either party, it was held not to be improper for one party, in the absence of the other, to give explanations concerning the items to the accountant, since he was not a judge, but only an assistant of the arbitrator.<sup>4</sup> In another case, however, where the accountant was to examine and report to the arbitrator, explanations as to certain items, made to him by one party in the absence of the other, were said to constitute a “course of proceeding which the court of chancery could not possibly sanction.”<sup>5</sup>

An express assent by the plaintiff’s agent for conducting the reference, that the defendant may call upon the arbitrator alone and produce his books before him, will prevent the possibility of any objection founded upon such a proceeding.<sup>6</sup>

<sup>1</sup> *Blanton v. Gale*, 6 B. Monr. 260.

<sup>2</sup> *Hewlett v. Laycock*, 2 Car. & Payne, 574. See *Matson v. Trower*, 1 Ryl. & M. 17.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 166.

<sup>4</sup> *Harvey v. Shelton*, 7 Beav. 455.

<sup>5</sup> *Haigh v. Haigh*, 31 L. J. Chy. 420.

<sup>6</sup> *Hamilton v. Bankin*, 3 De Gex & S. 782.

**Duty of Party objecting to Private Examination.** — Generally, if a party intends to object to the award because evidence has been received privately by the arbitrators, he should state the fact at the next meeting.<sup>1</sup> If he is silent on the subject, and afterward attends meetings and proceeds with the hearing, he will in most cases be taken to have waived the objection.<sup>2</sup>

**Curing Objection on Ground of Improper Receipt of Evidence.** — If the arbitrators improperly receive evidence in the absence of both parties, but at the next meeting, upon objection being made to their having done so they strike it out, a party who afterward proceeds with the examination of witnesses before them will be taken to have waived his right to demand that the award be set aside on the ground of this irregularity.<sup>3</sup> But if it be clear from the conduct of the party that he does not intend to waive his right to object because evidence has been received in his absence and parties excluded whom he wished to have present, the waiver will not be created by his simple continuance to attend at the hearings.<sup>4</sup> Attendance only raises a presumption of waiver, which is not conclusive in law, but may be rebutted by proof of any facts showing with sufficient distinctness a contrary intention.

**Attendance of Counsel, Advisers, &c.** — Russell says that it is the duty of a party who intends to employ counsel at a hearing, to give notice of his intention to his opponent, so that he also may be prepared with the like assistance if he desires it.<sup>5</sup> There is an English case wherein no such notice had been given: the one party appeared with counsel; the other, having none, asked a postponement to obtain professional aid; the arbitrator refused the request. The court held that in so refusing the arbitrator had acted unfairly between the parties, and consequently annulled the award. They said that it was

<sup>1</sup> *Hewlett v. Laycock*, 2 Car. & Payne, 574.

<sup>2</sup> *Drew v. Drew*, House of Lords, March 8, 1855.

<sup>3</sup> *Kingwell v. Elliott*, 7 Dowl. 423.

<sup>4</sup> *Haigh v. Haigh*, 31 L. J. Chy. 420.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 165.

“not reasonable that one party should have the assistance of counsel and the other not. Distinct notice ought to have been given.”<sup>1</sup>

No case, so far as I have been able to discover, has arisen in the United States in which this rule has been asserted. I believe it to be the established practice for each party to act as he chooses in the matter of employing counsel; provided, of course, that he resorts to no concealment or deception in the matter. And Russell himself seems almost to contradict his above-recited statement in the next following paragraph, in which he says that “in the ordinary course” an arbitration is conducted like a trial; and the parties “are usually attended or represented by their attorneys or counsel, who conduct the proceedings in behalf of their respective clients.” Certainly the employment of counsel, though it cannot be quite said to be a universal custom, is yet of such common occurrence that there could seem to be little necessity for formally notifying the opposite party of an intent so to do.

**Arbitrator's Discretion to hear Counsel.** — It is said to be in the discretion of the arbitrators to hear or to refuse to hear counsel, as they shall see fit.<sup>2</sup>

They appear to have the same general discretion to allow or refuse the presence of any person who is an expert, or who has a peculiar knowledge of the subject-matter of the controversy, who is present neither as a witness nor as counsel, but simply to assist with his knowledge one of the parties.<sup>3</sup>

But if they abuse this discretion, and a party is presumptively prejudiced by their refusal to allow him the aid which he desires, their award may be therefore void. Thus where an arbitrator excluded from some of the meetings the son of a party who was familiar with the accounts in dispute, and also a short-hand writer, both of whom the party wished to have

<sup>1</sup> *Whatley v. Morland*, 2 Dowl. 249.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 166; *Macquen v. Nottingham Caledonian Society*, 9 C. B. N. S. 793; *Collier v. Hicks*, 2 Barn. & Ad. 663.

<sup>3</sup> *Tillam v. Copp*, 3 C. B. 211.

present, the Lords Justices vacated the award on the ground that this party's interests might have been unfairly prejudiced by the exclusion.<sup>1</sup>

**Arbitrator's Right to Call in Counsel.** — The arbitrator cannot always call in counsel to be present at the proceedings and to aid him with advice. Thus where one party had objected to submitting to a professional man, and consequently submission had been made to a mining agent, the arbitrator nevertheless brought an attorney to the hearing to sit with him. The party having protested in vain, withdrew from the hearing. The arbitrator proceeded *ex parte*, and the court set aside his award.<sup>2</sup>

**Administration of Oaths to Witnesses.** — If the submission, rule of court, or statute under which the arbitrators act are silent on the subject of the administration of oaths to the witnesses, no necessity for that formality will exist. The witnesses may be heard unsworn if the parties make no objection.<sup>3</sup> It was held in England, that before the enactment of the Statute 15 & 16 Vict. c. 99, § 16, which empowered arbitrators to administer oaths, even the arbitrator himself could not insist upon the swearing if the submission was silent on the subject.<sup>4</sup>

At common law an arbitrator cannot administer an oath.<sup>5</sup> His power to do so can be obtained only by virtue of specific statutory enactments. Such statutes have been passed in England and in many, perhaps in most, of the States in this country.

But a *referee*, properly so called, may obtain power to administer a judicial oath, or compel production of books, &c., either from statutory provisions or from the order of the court

<sup>1</sup> Haigh v. Haigh, 31 L. J. Chy. 420.

<sup>2</sup> Proctor v. Williamson, 29 L. J. C. P. 157, and 8 C. B. N. S. 386.

<sup>3</sup> Large v. Passmore, 5 Serg. & R. 51; Maynard v. Frederick, 7 Cush. 247.

<sup>4</sup> Caledonian Railway Company v. Lockhart, 3 Macq. 808.

<sup>5</sup> Tobey v. County of Bristol, 3 Story, 800; Large v. Passmore, 5 Serg. & R. 51; People v. Townsend, 5 How. Pr. 315; In the Matter of Wells, 1 N. Y. Legal Obs. 189; Street v. Rigby, 6 Ves. Jr. 815; Wellington v. McIntosh, 2 Atk. 569; Halfhide v. Fenning, 2 Bro. C. C. 336.

appointing him. In the absence of such provisions, and if the order should be insufficient, the oath would be simply a nullity.<sup>1</sup>

If the submission requires that the witnesses be examined under oath, the necessity for so doing will be imperative, and can be dispensed with only by the subsequent consent of the parties to the submission.<sup>2</sup>

If the submission or rule requires the arbitrators to swear the witnesses, and they have no statutory authority to do so, they must call in for this purpose some magistrate who has this power. Or if the submission be in a pending cause, the custom in England, before the passage of the Statutes 3 & 4 W. IV. c. 42, § 41, and 14 & 15 Vict. c. 99, § 16, was to have the witnesses sworn before a judge at chambers, or in court at Westminster.<sup>3</sup>

But the magistrate called in must be fully empowered or the oath will be invalid. Thus where witnesses were to give their testimony orally, and they were sworn before a commissioner for taking affidavits, it was held insufficient under a submission by judge's order requiring that the oaths should be taken before a judge or before a *commissioner duly authorized*.<sup>4</sup>

If the submission provide that "the witnesses be examined on oath," it has been held that the introduction of written affidavits would be a sufficient irregularity to avoid the award.<sup>5</sup>

**Unauthorized Administration of Oath.**—If the arbitrators, or attorneys of the parties in the presence of the arbitrators, undertake to swear the witnesses, though having in fact no legal authority to do so, they will not thereby render their proceedings invalid. If the absence of a binding oath is not a fatal omission, the administering one not binding will be imma-

<sup>1</sup> *Bonner v. McPhail*, 31 Barb. 106; *Frazer v. Phelps*, 3 Sandf. (Sup. Ct.) 741. And see the arguments in *Imlay v. Wikoff*, 1 South. (N. J.) 132.

<sup>2</sup> *Ridoat v. Pye*, 1 Bos. & P. 91; *Biggs v. Hansell*, 16 C. B. 562.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 176.

<sup>4</sup> *Rex v. Hanks*, 3 Car. & Payne, 419; *Rex v. Newman*, 1 Wils. 7.

<sup>5</sup> *Banks v. Banks*, 1 Gale, 46.



terial.<sup>1</sup> Such an oath would be a mere nullity, and the witness testifying falsely could not be punished for perjury.<sup>2</sup>

**Parties may dispense with the Oath.**—The parties may dispense with the formality of the oath if they see fit ;<sup>3</sup> unless perhaps a statutory provision requiring its administration should exist and should be held imperative and not directory merely, and not within the reach of a waiver by the parties. It has been held that if at the hearing both parties have apparently assented to the examination of the witnesses unsworn, by proceeding without making an express objection on this ground, they will not be allowed to make it a ground of objection afterward.<sup>4</sup> So also it was held in Massachusetts, the court, *per* Bigelow, C. J., saying that, “In such cases silence is acquiescence, and amounts to a waiver of all objections to irregularities in the proceedings.”<sup>5</sup> But another New York case appears to take a different ground, and declares that the objection to the competency of the arbitrator to administer the oath is not waived, because it is not taken at the hearing.<sup>6</sup>

The former doctrine must be regarded as the most sound, and has the support of the English authorities. “By not persisting at the time of examination in requiring that the witness should be sworn, a party will be taken to have assented to the omission of the oath.”<sup>7</sup> So says Russell, and the adjudications bear out the statement. Even where the defendant objected to the examination of one of the plaintiff’s witnesses on the ground of his not having been sworn, and the arbitrators overruled the objection and heard his testimony, the defendant, having afterward himself called witnesses who were heard to testify unsworn, was held not only to have waived

<sup>1</sup> *Large v. Passmore*, 5 Serg. & R. 51.

<sup>2</sup> *Rex v. Hallett*, 20 L. J. M. C. 197.

<sup>3</sup> *Ridoat v. Pye*, 1 Bos. & P. 91 ; *Biggs v. Hansell*, 16 C. B. 562 ; and cases cited *post*, in the further discussion of this topic.

<sup>4</sup> *Bergh v. Pfeiffer*, Hill & Den. 110 ; *Large v. Passmore*, 5 Serg. & R. 51.

<sup>5</sup> *Maynard v. Frederick*, 7 Cush. 247.

<sup>6</sup> *In the Matter of Wells*, 1 N. Y. Legal Obs. 189.

<sup>7</sup> *Russell on Arb.*, 8d ed. pp. 175, 176.

his right to object, but even to have acquiesced in the course pursued.<sup>1</sup>

No especial form of oath is necessary.<sup>2</sup>

**Arbitrator's Power to force Attendance of Witnesses and Production of Documents.**—Except by virtue of statutory provisions conferring the authority, an arbitrator has no power to compel the attendance of witnesses or the production of books or papers.<sup>3</sup>

**Protection of Witnesses.**—If, however, he acquires this power by statute, as is the case in Great Britain, it has been held in causes arising in that country, that parties, witnesses, and attorneys, attending under this compulsion are free from arrest, *eundo, morando et redeundo*, in precisely the same manner as if they were summoned by the ordinary judicial process to attend a trial in a court of law.<sup>4</sup>

Though if the arbitrator possesses no such compulsory power, witnesses who attend voluntarily are not entitled to this privilege. But a voluntary attendance, if the arbitrator possesses the power though he has not exercised it, gives a right to the exemption.<sup>5</sup>

The protection covers adjournments from day to day, but not the interval if one adjournment extends over several days.<sup>6</sup>

If a person be arrested in contravention of this right, though in the presence of the arbitrator, the authority of the arbitrator does not extend to discharging the arrest.<sup>7</sup>

**Rules governing Arbitrator respecting the Admission of Evidence.**—The English rule is, that in determining such questions

<sup>1</sup> Allen v. Francis, 9 Jur. 691; 4 Dowl. & Low. 607, n.; Smith v. Sparrow, 16 L. J. Q. B. 139; 4 Dowl. & Low. 604.

<sup>2</sup> Russell on Arb., 3d ed. p. 178.

<sup>3</sup> Tobey v. County of Bristol, 3 Story, 800; Webb v. Taylor, 1 Dowl. & Low. 676.

<sup>4</sup> Webb v. Taylor, 1 Dowl. & Low. 676; Spence v. Stuart, 3 East, 89; Randall v. Gurney, 3 Barn. & Ad. 252; 1 Chitty, 679; Ricketts v. Gurney, 7 Price, 699; 1 Chitty, 682; Moore v. Booth, 3 Ves. Jr. 350.

<sup>5</sup> Webb v. Taylor, 1 Dowl. & Low. 676.

<sup>6</sup> Spencer v. Newton, 6 Ad. & El. 623; *Ex parte Temple*, 2 Ves. & B. 395; *Ex parte Russell*, 1 Rose, 278.

<sup>7</sup> Russell on Arb., 3d ed. p. 175; citing also Taylor on Evid. 861.

relating to the admissibility of evidence as arise in the course of the proceedings, the arbitrator "is not at liberty to follow any arbitrary principle of his own, but is bound by the same rules of evidence as govern the Superior Courts."<sup>1</sup>

The decisions in this country assert a different doctrine. It may be laid down as law in the United States, that arbitrators "are not bound by the strict rules of law as to the admission of evidence."<sup>2</sup> So also in an earlier case it was said: "We think there is no doubt that the referees might receive the testimony of a (legally) incompetent witness, if in their judgment the justice of the case required it."<sup>3</sup>

**His Decision is final:** But in both countries alike, though there be a difference as to the latitude which may be allowed him in regard to the principles by which it is his duty to be governed in forming his decision upon these questions, yet that decision itself is final. The arbitrator is the ultimate judge both of admissibility and weight.<sup>4</sup>

In the great case of the Boston Water Power Company v. Gray,<sup>5</sup> Chief Justice Shaw said: "In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, and the inferences of fact to be drawn from it."

<sup>1</sup> Russell on Arb., 3d ed. p. 193; Attorney-General v. Davison, 1 M'Lel. & Yerg. 160. But see on p. 136, *post*, Hagger v. Baker, 14 Mee. & W. 9.

<sup>2</sup> Hooper v. Taylor, 39 Maine, 224; *per* Bigelow, C. J., in Maynard v. Frederick, 7 Cush. 246; Eyres's Executor v. Fennimore, 2 Penning. \*932; Fennimore v. Childs, 1 Halst. 386. And see Mulder v. Cravat, 2 Bay, (S. C.) 370; Latimer v. Ridge, 1 Binn. 458.

<sup>3</sup> Fuller v. Wheelock, 10 Pick. 135.

<sup>4</sup> Campbell v. Western, 3 Paige, 124; Shaifer v. Baker, 38 Ga. 135; Hooper v. Taylor, 39 Maine, 224; Pike v. Gage, 9 Foster, (N. H.) 461; *In re* Marsh, 16 L. J. Q. B. 330. Also the English cases cited on p. 136, note 1; see also *post*, under "Arbitrators as Final Judges of Law and Fact."

<sup>5</sup> 6 Metc. (Mass.) 131.

Russell says: "If, intending to decide rightly, [the arbitrator] come to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy and propriety of allowing proof of particular facts, it is now settled law that the court will not review his decision or set aside the award for the mistake."<sup>1</sup>

It seems, however, that cases may arise wherein the error is so gross and its results are presumably so important, that an exception to the rule would be allowed to obtain. Thus where an arbitrator refused to hear evidence of the contents of a letter which was proved to have been lost, Lord Eldon intimated that he thought the mistake would constitute a good objection to an application to carry the award into execution.<sup>2</sup>

This rule of refusing to interfere with an award on the ground of erroneous decisions as to the admission of proffered evidence has been carried very far in England. Thus in a case where an arbitrator admitted the plaintiff's own books in evidence for him, stating that he (the arbitrator) was aware they would be inadmissible in a trial at Nisi Prius, but he was not bound by such rigid rules of evidence, the court refused to set aside the award, and said that the worst which was shown was a mistake by the arbitrator concerning the law of evidence.<sup>3</sup> It must be confessed that it does not seem easy to reconcile this decision with the rule above stated to have been laid down in *Attorney-General v. Davison* (*ante*, p. 135). In that case it was said to be the duty of the arbitrator to be governed by the rules of law as to admitting testimony. In this case, by his own statement, he declined so to be governed; and the decision of the court seems to go beside the case rather than to

<sup>1</sup> Russell on Arb., 3d ed. p. 193; *Hagger v. Baker*, 14 Mee. & W. 9; *Eastern Counties Railway Company v. Robertson*, 6 Man. & Gr. 38; *Armstrong v. Marshall*, 4 Dowl. 593; *Perriman v. Steggall*, 9 Bing. 679; *Wilson v. King*, 2 Cr. & Mee. 689; 2 Dowl. 638, n. a.; *Campbell v. Twemlow*, 1 Price, 81; *Musselbrook v. Dunkin*, 9 Bing. 605; *Slowman v. Wiggins*, 6 C. B. 276.

<sup>2</sup> *Anderson v. Darcy*, 18 Ves. Jr. 447.

<sup>3</sup> *Hagger v. Baker*, 14 Mee. & W. 9.

meet it, for his mistake seems to have been quite obviously as to his own power and duty, and not as to the legal character of the evidence offered. At any rate, the practical effect of *Hagger v. Baker* is to render the rule of *Attorney-General v. Davison* a very empty and valueless doctrine.

In an action to recover for the board and lodging of defendant's wife, defendant pleaded only *non assumpsit*. The arbitrator admitted evidence of adultery, and decided against the plaintiff. The plaintiff objected to the award on the ground that the matter of adultery was not open to inquiry, since it had not been pleaded. The court, assuming the objection to the evidence to be sound in law, yet held it to be immaterial, since it amounted only to the admission of inadmissible testimony.<sup>1</sup>

It seems, however, to be a rule based both in justice and in common sense, that an arbitrator shall not be allowed to admit testimony going to establish a demand or a defence which the defendant has no legal right to enforce or to rely upon. It has been so held in California, in a case where the court declared that the arbitrator had no right to admit testimony against the objection of a party to establish a demand barred by the Statute of Limitations.<sup>2</sup> Nor is this in contravention of the rule laid down in the preceding English cause; for there the defence of adultery does not appear to be one which the defendant had no right to set up at all in the action, but only one which he could not properly be allowed to urge under the technical rules of law as applied to his pleadings. There is, however, the great cardinal principle that arbitrators may decide a case upon its general equity; and as this rule would sometimes enable them to allow demands or sustain defences not strictly permissible at law, so they must of course have the right to admit evidence concerning any such demand or defence. The natural and proper test must be taken to be

<sup>1</sup> *Symes v. Goodfellow*, 2 Bing. N. C. 532.

<sup>2</sup> *De La Riva v. Berreyesa*, 2 Cal. 195.

whether or not, if the fact be proved, the arbitrators can consider it, and this is not identical with the question of admissibility, nor to be determined by the same principles.

The arbitrator may sometimes be authorized to inquire into matters not submitted, provided he needs to do so in order to come to a proper decision in the matter submitted. But even if, without this justification, he receives evidence of matters outside of the submission, it has been said that this is simply a case of the reception of improper evidence, and will not constitute cause for setting aside the award.<sup>1</sup>

**Rejection of Evidence under Mistake concerning the Scope of the Submission.**— It will sometimes happen that evidence will be offered which in fact bears upon some matter included in the submission, but which the arbitrator, being under a contrary impression, will refuse to receive. It is perfectly clear that an error of this kind is not a mistake concerning the admissibility of evidence, but concerning the scope of the submission. The courts have preserved the distinction, and set aside the award in such cases upon the ground that the arbitrator has omitted to pass upon some of the matters submitted.<sup>2</sup>

**Erroneous Ruling on Evidence by a Referee.**— Where the referee is to be regarded as an officer of the court, before whom the trial is to be conducted upon legal principles, his admission of incompetent evidence will be a ground for setting aside his report and ordering a new trial.<sup>3</sup> For though the admission of such evidence would be an immaterial error where it can be clearly shown that it could not reasonably have influenced or misled the minds of the referees, and in such

<sup>1</sup> *Eastern Counties Railway Company v. Robertson*, 1 Dowl. & Low. 498; 6 Man. & Gr. 38.

<sup>2</sup> *Samuel v. Cooper*, 2 Ad. & El. 752; *Brophy v. Holmes*, 2 Moll. 1; *Russell on Arb.*, 3d ed. p. 178.

<sup>3</sup> *Allen v. Way*, 7 Barb. 585. But see *Chesley v. Chesley*, 10 N. H. 327, *post*, and *Hooper v. Taylor*, 39 Maine, 224, which shows clearly that a referee is not always an officer of the court in such a sense as to be restricted in his free discretion, to admit or reject evidence as he sees fit.

cases the court, looking to the general result, will not interfere,<sup>1</sup> yet it is matter of extreme delicacy and difficulty to come to the decision that the interest of the party against whom it was admitted was not at all, perhaps insensibly, prejudiced in the mind of the referee. This difficulty has been regarded as very serious, even where the referee stated that though he had at first admitted the evidence, yet he had afterward omitted it from his consideration in making up his decision and report.<sup>2</sup>

Judge Redfield, commenting on the admission of what was "no doubt, incompetent testimony" before referees, said that it clearly had no possible tendency to mislead their minds, nor do they intimate that they relied upon it in any sense in deciding the case. "Indeed, they could not if they were rational men. The plaintiff had distinctly admitted a fact against his interest. His showing that at other times he had asserted the fact to be otherwise, would not in any sense qualify his admission. And although the testimony was improperly admitted, yet as it had no tendency to mislead the referees, and did not mislead them, so far as we can learn, it is no sufficient reason for setting aside the report."<sup>3</sup>

Referees in a pending cause have been allowed to admit evidence equitably bearing upon the case, but inadmissible in a court of law, where they undertook to make their decision confirm to justice rather than to law.<sup>4</sup> The court in New Hampshire said: "Even if [the evidence] was not admissible at law, the report cannot be rejected for that reason. The referees in admitting it do not appear to have undertaken to decide according to law, and to have mistaken its principles. If they thought proper to receive evidence which might equitably have a bearing upon the case, but which could not have

<sup>1</sup> *Learned v. Bellows*, 8 Vt. 79; *Spear v. Myers*, 6 Barb. 445.

<sup>2</sup> *Allen v. Way*, 7 Barb. 585 (*per Allen, J.*).

<sup>3</sup> *Learned v. Bellows*, 8 Vt. 79.

<sup>4</sup> *Chesley v. Chesley*, 10 N. H. 327; *Fuller v. Wheelock*, 10 Pick. 135.

been admitted in a court of law, the report cannot be impeached for that reason."

**The Referee may leave the Question of Admissibility to the Court.**—The referee may, if he choose, decline to pass upon the question of admissibility, and leave it for the court to determine. This he will do by reporting the testimony as to which he is in doubt, and giving his decision in the alternative. If the court is of opinion that the testimony should have been admitted, then he finds, &c. ; if, however, the court are of opinion that the testimony should not have been admitted, then he finds, &c. The court will then pass upon the admissibility, and confirm the one or the other of his findings in accordance with their ruling on this point.<sup>1</sup> But he must, in such case, find the facts and report them absolutely and conclusively. He cannot report testimony and leave the court to find or infer the facts from it.<sup>2</sup>

In *Fuller v. Wheelock*,<sup>3</sup> a pending cause was referred by the rule of the Supreme Judicial Court. An interested person was admitted to testify against the objection of a party. The referees reported, awarding a certain sum to the plaintiff, "on condition that W. (the interested witness) shall be adjudged by the justices of the Supreme Judicial Court to have been legally admitted to testify in the cause." Otherwise they awarded the defendant his costs. The court said that the extraordinary powers of the referees to admit legally incompetent testimony were immaterial in this case, for the language of the award showed it to be their intention to found their decision upon legal and competent evidence. The witness, W., was not competent at law ; therefore judgment should be rendered for the defendant for his costs.

In England, if a question as to the admissibility of evidence arises as to which the arbitrator is in doubt, so that he desires

<sup>1</sup> *Hooper v. Taylor*, 39 Maine, 224.

<sup>2</sup> *Barnard v. Spofford*, 31 Maine, 39.

<sup>3</sup> 10 Pick. 135.



the order of the court concerning it, his proper course is said to be to state the point in the shape of a certificate or case setting out all the necessary facts. This will be considered on the argument before the court in the same manner as an objection to evidence at *Nisi Prius*, and the party objecting to the admission of the evidence will be entitled to begin.<sup>1</sup>

It is also held in England that a party may specifically reserve to himself in the submission the right of objecting to the admission of evidence in the same manner as in a trial at *Nisi Prius*. If the arbitrator admit evidence to which the party has objected, he may, under this stipulation, move the court to set aside the award on the ground of error in the admission.<sup>2</sup>

**A Referee need not report Evidence.** — An arbitrator or referee is not obliged to report the evidence, or to append copies of documents submitted, even though requested so to do by the parties;<sup>3</sup> though in references under certain statutes of *Mississippi* the courts of that State have held otherwise.<sup>4</sup>

**Parties may be admitted as Witnesses.** — Parties and persons interested in the event may be allowed by the arbitrators to testify.<sup>5</sup>

The law is now the same in England, though formerly, before the recent changes in the law of evidence, “nice questions were raised as to the extent of the power of the arbitrator to examine the parties and the proper mode of such examination.”<sup>6</sup>

But if arbitrators examine a party who by reason of interest

<sup>1</sup> Russell on Arb., 3d. ed. p. 195; *Attorney-General v. Davison*, 1 M'Lel. & Yerg. 160.

<sup>2</sup> Russell on Arb., 3d. ed. p. 195; *Scott v. Van Sandau*, 1 Q. B. 102.

<sup>3</sup> *Allen v. Miles*, (Smith's Adm'r) 4 Harrington, 234.

<sup>4</sup> *Green v. Creighton*, 7 Sm. & Mar. 197.

<sup>5</sup> *Fuller v. Wheelock*, 10 Pick. 137; *Hollingsworth v. Leiper*, 1 Dall. 161; *McRae v. Robeson*, 2 Murph. 127; *Askew v. Kennedy*, 1 Bailey, 46; *Maynard v. Frederick*, 7 Cush. 247. *Aliter*, as to parties, in New Jersey and Virginia; *Eyres's Ex'r v. Fennimore*, 2 Penning. \*932; *M'Allister v. M'Allister*, 1 Wash. 193; *Fennimore v. Childs*, 1 Halst. 386.

<sup>6</sup> Russell on Arb., 3d. ed. p. 183.

would be incompetent at law, and at the same time expressly state their intention to found their decision upon "legal and competent evidence," this error will be cause for vacating their award.<sup>1</sup>

An action of trespass *quare clausum fregit* was submitted, with the stipulation that "the duties of the referees shall be confined to reporting a statement of facts, and that the case shall be presented to the court upon that report as an agreed statement of facts, the court to draw such inferences as should be properly drawn from the facts so reported." In order to prove a fact material to the plaintiff's case, the plaintiffs themselves were admitted to testify, against the defendant's objection. It was acknowledged that at law parties were incompetent witnesses in an action of trespass to land; but it was urged that the latitude allowed to referees made their testimony competent in this case. The court ruled otherwise. Whatever might have been the power of the referees in an ordinary case, it was restricted by the express agreement made by the parties in this submission. They "were expressly limited to the duty of reporting a statement of facts, restraining them from deciding on any questions of law. It was for the purpose of presenting the case to the court on the same ground as upon a special verdict, and a special verdict must be upon strictly legal evidence."<sup>2</sup>

**Arbitrator's Discretion to Refuse to hear Evidence.**—An arbitrator has some power within his discretion to determine how much evidence he will hear;<sup>3</sup> but it is his general duty to hear all evidence material to the case, which is offered. Mr. Russell says that "declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award."<sup>4</sup> And we have already seen that refusal to

<sup>1</sup> Fuller v. Wheelock, 10 Pick. 135.

<sup>2</sup> Fowler v. Thayer, 4 Cush. 111.

<sup>3</sup> Nicholls v. Warren, 6 Q. B. 615 (*per* Lord Denman, C. J., p. 618).

<sup>4</sup> Russell on Arb., 3d. ed. p. 178; Johnstone v. Cheape, 5 Dow. 247.

hear testimony concerning any special matter on the erroneous supposition that such matter is not within the scope of the submission will suffice to avoid the award.<sup>1</sup>

Even where the subject-matter in dispute is such that the arbitrator thinks he can judge conclusively about it by simply taking a view, as where the action is for not repairing a house, or for not building a certain vehicle according to a certain contract, he must yet hear each party if desired so to do. His award made simply on his own inspection will be bad; at least if either party wished to be heard and to introduce testimony.<sup>2</sup>

There are cases which would go far to sustain the broad, general rule that if arbitrators refuse to hear testimony which is offered, and is in fact pertinent and material to the controversy, going to prove a point which needs to be proved, and properly admissible; the error may be cause for vacating the award or report.<sup>3</sup> Thus, for example, the matter being an appraisalment of the value of certain buildings erected on land during the term of a lease, the refusal by the arbitrators to hear testimony as to the original cost was held a sufficient cause for setting aside their award.<sup>4</sup> And it has been held that arbitrators have no right to refuse altogether to hear evidence going to impeach the credit of a witness.<sup>5</sup>

But if the submission be to an expert, as such, the rule may be different. Thus if a person is selected as an arbitrator by reason of some especial knowledge or skill possessed by him with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon his personal information, investigation, and judgment, it may be that he will be justified in refusing altogether to hear evidence. Thus where

<sup>1</sup> *Ante*, p. 138.

<sup>2</sup> *Anon.* 2 Chitt. R. 44; *Braddick v. Thompson*, 8 East, 344.

<sup>3</sup> *Johnstone v. Cheape*, 5 Dow. 247. And see *Samuel v. Cooper*, 2 Ad. & El. 752; *Brophy v. Holmes*, 2 Moll. 1.

<sup>4</sup> *Van Cortlandt v. Underhill*, 17 Johns. 405, overruling, on appeal, the contrary decision of the court of chancery in the same case, 2 Johns. Ch. 339; *Burroughs v. Thorne*, 2 South, 777.

<sup>5</sup> *Ligon v. Ford*, 5 Munf. 10.

it was referred to surveyors to settle the amount of rent and the other terms of a lease of a coal mine, and no witnesses were examined, Lord Chancellor Cranworth said: "I do not agree in the suggestion that it was incumbent upon the arbitrators to examine witnesses. I do not think that is the meaning when a matter is referred to surveyors and people of skill to settle what the value of the property to be bought or let is. Necessarily they are entrusted from their experience and their observation to form a judgment, which the parties referring to them agree shall be satisfactory. Therefore I do not think there was any thing of importance in their not examining witnesses, provided, *bona fide*, they meant to say, 'we know sufficient of the subject to decide properly without examining witnesses.' " <sup>1</sup>

So also, in another case, the submission recited that the arbitrator was selected on account of his skill and knowledge concerning the subject. He refused to consider a statement of facts which one of the parties presented and offered to support by proof. He was held to have acted justifiably, provided that, with the knowledge he had upon the subject, he felt satisfied that the proof of these facts, even if satisfactorily made, could not affect his decision.<sup>2</sup>

It has been held, however, that if an arbitrator is requested by a party to view the premises, — *e. g.*, under a submission of a claim for builder's work done to a house, — it is within his discretion whether he will do so or not.<sup>3</sup>

**Number of Witnesses.** — The number of witnesses who may be introduced to give expert testimony or to express opinions may be limited by the referee, as by any other judicial tribunal, according to his discretion. The limitation of witnesses, as to the genuineness of certain handwriting, to twenty upon each

<sup>1</sup> Eads v. Williams, 24 L. J. Chy. 531; Caledonian Railway Company v. Lockhart, 3 Macq. 808.

<sup>2</sup> Johnstone v. Cheape, 5 Dow. 247.

<sup>3</sup> Mundy v. Black, 9 C. B. N. S. 557.

side, was held not to be an unreasonable exercise of such discretion.<sup>1</sup>

**Closing Case too hastily.** — It is said that if a case is closed with such undue haste as to be a surprise upon a party and to prevent his tendering evidence which he wished to have heard, it will be a cause for setting aside the award.<sup>2</sup> The proper course, in order to prevent possible errors of this description, is obviously that the arbitrator shall state to the parties when he considers that the case is closed. They can then notify him if they still have other testimony to present.<sup>3</sup>

**Opening Case for New Evidence.** — Whether or not a case shall be opened at any stage, to allow a party who has rested to introduce new evidence which should have been offered in the first instance and does not operate in rebuttal, is a matter resting in the first instance, at least, within the discretion of the referee.<sup>4</sup> The rule is the same if the whole case has been closed and rests with him for decision.<sup>5</sup> And an arbitrator has been sustained in allowing a case to be opened, even after he has actually drawn up but has not delivered his report, the party offering the evidence not having been previously culpably negligent in failing to procure it earlier.<sup>6</sup>

In *Williams v. Hayes*,<sup>7</sup> the court said: "As to the offers of proof, they were made after the case had been closed by consent of all parties. The receiving of further proof was then not matter of strict legal right on the part of the party offering it. Its admission rested primarily in the discretion of

<sup>1</sup> *Sizer v. Burt*, 4 Denio, 426.

<sup>2</sup> *Earle v. Stocker*, 2 Vern. 251; *Pepper v. Gorham*, 4 Moore, 148; *Dodding-ton v. Hudson*, 1 Bing. 384; *Gladwin v. Chilcote*, 9 Dowl. 550; *Bedington v. Southall*, 4 Price, 232; *Haigh v. Haigh*, 31 L. J. Chy. 420; *Fryer v. Shaw*, 27 L. J. Exch. 320; *Spettigue v. Carpenter*, 3 P. Wms. 361.

<sup>3</sup> *Pepper v. Gorham*, 4 Moore, 148; *Earle v. Stocker*, 2 Vern. 251; *Peterson v. Ayre*, 28 L. J. C. P. 129.

<sup>4</sup> *Williams v. Hayes*, 20 N. Y. 58; *Pearson v. Fiske*, 2 Hilton, 146; *De lafield v. De Grauw*, 9 Bosw. 1; *Spear v. Myers*, 6 Barb. 445.

<sup>5</sup> *Duguid v. Ogilvie*, 3 E. D. Smith, 527; *Cleaveland v. Hunter*, 1 Wend. 104.

<sup>6</sup> *Cooper v. Stinson*, 5 Minn. 201.

<sup>7</sup> 20 N. Y. 58.

the referee, and if he did not think proper to allow the proof to be made, and the supreme court [out of which the rule of reference issued] did not think a case made out requiring them to relieve the party, there is no remedy. The court of appeals cannot review the exercise of the discretion of the original tribunal."

But where it had been agreed that a certain meeting should be the last, and that all the evidence on both sides should be produced, and a party afterward applied to the arbitrator for another hearing on the ground of having come into possession of fresh evidence in rebuttal of accounts introduced by his opponent at the last meeting, and the arbitrator refused to grant the application, the court refused to interfere with the award, saying that the request was addressed to the discretion of the arbitrator.<sup>1</sup>

**Admission of Evidence de bene esse.** — The arbitrator cannot, against the objection of a party, admit evidence *de bene esse*, or provisionally, or reserving to himself the power of subsequently retaining or rejecting it at the conclusion of the case.<sup>2</sup> Neither can he admit evidence absolutely and afterward throw it out of his consideration in coming to his conclusion upon the case.<sup>3</sup> The obvious injustice which might be worked to each or either party shows the necessity of this rule.

In *Allen v. Way*,<sup>4</sup> it was said that "it would be liable to great abuse if a referee or court could admit evidence in fact *de bene esse*, although professedly admitting it absolutely, and then reject it upon making up a decision or report upon the whole case. The rights of both parties might be prejudiced by the act of the court or referee in thus reviewing their interlocutory decisions. (1) The party whose evidence is at first ad-

<sup>1</sup> *Ringer v. Joyce*, 1 Marsh. 404; and see *In re Hall v. Anderton*, 8 Dowl. 326.

<sup>2</sup> *Peck v. York*, 47 Barb. 131; *Allen v. Way*, 7 Barb. 585 (*per Allen, J.*); *Clussman v. Merkel*, 3 Bosw. 402; *Brooks v. Christopher*, 5 Duer, 216; and see *McKnight v. Dunlop*, 1 Seld. 537.

<sup>3</sup> *Allen v. Way*, 7 Barb. 585 (*per Allen, J.*).

<sup>4</sup> 7 Barb. 585 (*per Allen, J.*).

mitted and finally rejected, loses the opportunity of excepting to the final decision by which his evidence is excluded as well as the opportunity of supplying evidence of the same facts from some other source. (2) The party against whom the evidence is admitted, relying upon the ruling, may, for aught that can appear, have presented his case in an entirely different manner from that in which, but for the admission of the objectionable evidence, he would have done. It is a power which cannot be safely exercised by a referee. His discretion, as well as his authority, over the interlocutory questions presented in the progress of the trial, ceases with his decision of them or at least with the trial itself. Probably during the trial an error in the admission or rejection of evidence may be cured ; for during that time the parties may be placed in the same position they were in before the error."

"A party has a right to know, when evidence is received against him, whether it is to be held competent, so that he may except to its reception and conduct his side of the case with knowledge of what is to remain in it as evidence."<sup>1</sup>

But the objecting party must except at the time to the provisional reception of evidence ;<sup>2</sup> or at the close of the hearing, he must obtain a distinct ruling thereon, and then except to that ruling, if it displeases him.<sup>3</sup>

**Adjournments are in Arbitrator's Discretion.**—The matter of adjournment is within the discretion of the arbitrator or referee.<sup>4</sup> He may adjourn at the request of a party or even for his own convenience without the consent of the parties or either of them ; provided, however, that the adjournment must be for no more than a reasonable time.<sup>5</sup>

A submission named a time for making the award, but

<sup>1</sup> *Peck v. Yorks*, 47 Barb. 131.

<sup>2</sup> *Patten v. Hunnewell*, 8 Greenl. 19 ; *Brooks v. Christopher*, 5 Duer, 216 ; and see *Spear v. Myers*, 6 Barb. 445.

<sup>3</sup> *Brooks v. Christopher*, 5 Duer, 216.

<sup>4</sup> *Brown v. Leavitt*, 26 Maine, 251 ; *Bray v. English*, 1 Conn. 498.

<sup>5</sup> *Ex parte Rutter*, 3 Hill, 464.

extended it for a further reasonable period "in case either of the said parties shall, by affected delay or otherwise, prevent the arbitrators from making their award by the time limited." Held, that adjournments made at the request of the defendant and carrying the hearing beyond the time limited, fell within the case provided for; and the time was reasonably extended. Also that this period of extension was not to be employed exclusively for making and signing the award, but that it might be used for hearing the parties.<sup>1</sup>

Statutory provisions allowing referees to adjourn "from day to day," or "from time to time as may be necessary," do not materially affect their inherent power to adjourn in their own good discretion, nor preclude them from the right to adjourn for a longer time than a day.<sup>2</sup> Of the necessity the referees themselves must be judges. But the court may inquire into the matter and see that they do not act oppressively, and that the parties are not delayed for an unreasonable time.

**Adjournments before Referee in lis pendens.**—When a cause is before a referee, application for an adjournment is, as a general rule, properly made to him and not to the court.<sup>3</sup> But his decision will be inquired into, on motion, by the court, to see that his action has not operated to oppress or unreasonably delay the parties.<sup>4</sup>

For example, a decree of divorce had been granted, and the question of alimony was sent to a referee. Held, that his adjournment of the case, against the objection of the wife, to enable the husband to make a three months' trip to Europe was unreasonable; and that unless he should vacate the order of adjournment, the court would remove him.<sup>5</sup> But after the parties have agreed that the referees shall proceed to make

<sup>1</sup> *Bixby v. Whitney*, 11 Maine, (2 Fairf.) 62.

<sup>2</sup> *Ex parte Rutter*, 3 Hill, 464; *Richardson v. Hartsfield*, 27 Geo. 528.

<sup>3</sup> *Baker v. Lafitte*, 4 Rich. Eq. 392; *Langley v. Hickman*, 1 Sandf. 681.

<sup>4</sup> *Langley v. Hickman*, 1 Sandf. 681; *Ex parte Rutter*, 3 Hill, 464.

<sup>5</sup> *Forrest v. Forrest*, 3 Bosw. 650.



their decision, and they have accordingly agreed upon it, the application for an adjournment will come too late.<sup>1</sup>

In some cases, *e. g.*, where leave to postpone beyond the next term of the court is sought, for cause shown, it seems that application for a postponement may be made to the court, and the referees will be ordered to grant the requisite delay.<sup>2</sup> But though this power rests with the court, it is not exclusive of the like power in the referees.<sup>3</sup>

In New York an adjournment by referees in a cause beyond the next term of that court to which their report is returnable, unless perhaps by actual or implied consent of parties,<sup>4</sup> is error.<sup>5</sup>

**Death of Witness during Adjournment.** — An adjournment was ordered by referees for their own convenience, but with the consent of both parties, at the close of the direct examination of a witness. Pending the adjournment, the witness died, so that the other party lost the opportunity to cross-examine him. The court held that the direct examination should be allowed to stand and should be considered by the referees. By consenting to the adjournment, the party calling the witness ran the risk of impairing the force of his direct testimony by reason of the occurrence of any circumstance which should prevent the cross-examination; and the adverse party ran the risk of the occurrence of such a circumstance depriving him altogether of the advantage of cross-examination. But it was admitted that the rule should be otherwise, where the power to cross-examine had been lost by the fault or negligence of the party calling him, or by the misconduct of the witness in departing from the court without permission, or by his wilful

<sup>1</sup> *Coryell v. Coryell*, Coxe, 385.

<sup>2</sup> *Ex parte Rutter*, 3 Hill, 464; *Sudam v. Swart*, 20 Johns. 476; *Graham v. Morton*, 6 Wend. 552; *Bird v. Sands*, 1 Johns. Ca. 394; *Combs v. Wyckoff*, 1 N. Y. Term Reports, (Caines) 147.

<sup>3</sup> *Sudam v. Swart*, 20 Johns. 476.

<sup>4</sup> *Ex parte Rutter*, 3 Hill, 464.

<sup>5</sup> *Jackson v. Ives*, 22 Wend. 637; and see 2 R. S. 384, § 43.

neglect to attend at the time and place to which the hearing stood adjourned.<sup>1</sup>

**Record of Adjournment.**—The fact of the adjournment must appear of record.<sup>2</sup>

**Causes for Demanding Adjournment.**—It is perfectly proper to adjourn at the request of a party, surprised at an unexpected case set up against him, in order to enable him to introduce further evidence.<sup>3</sup> And where a referee had refused to adjourn for this purpose for the sole reason that he thought he had not authority to do so, the court ordered the hearing to be opened to receive the new testimony, the party introducing it paying the costs.<sup>4</sup> But generally the arbitrator's discretion will not be interfered with.<sup>5</sup>

Absence of a material witness from the State, who is, however, expected to return at a reasonably near day, is a sufficient cause for adjournment.<sup>6</sup>

Under the English rule that notice should be given by a party to his opponent of an intention to employ counsel, it was held, where a party had failed to give such notice and appeared with counsel, that his opponent was entitled to demand an adjournment to enable him also to procure professional assistance.<sup>7</sup>

If a party goes voluntarily to a hearing relying upon the witnesses of his adversary, it is too late for him afterward to demand an adjournment as matter of right to enable him to meet testimony of one of their witnesses which has surprised him, and which he believes to be false. The rule is the same as it would be in a trial at *Nisi Prius* in the courts.<sup>8</sup>

<sup>1</sup> *Forrest v. Kissam*, 7 Hill, 463.

<sup>2</sup> *Rickard v. Patterson*, 5 Harrington, 235; *Deputy v. Betts*, 4 id. 352.

<sup>3</sup> *Ibid.*; *Solomon v. Solomon*, 28 L. J. Exch. 129.

<sup>4</sup> *Packer v. French*, Hill & Den. 103.

<sup>5</sup> *Ringer v. Joyce*, 1 Marsh. 404.

<sup>6</sup> *Sudam v. Swart*, 20 Johns. 476.

<sup>7</sup> *Whatley v. Morland*, 2 Dowl. 249.

<sup>8</sup> *Woodworth v. Van Buskerk*, 1 Johns. Ch. 482.

The naked allegation of a party that he desires further time to produce testimony, is an insufficient ground upon which to demand an adjournment as matter of right. What evidence he expects to produce, the reason why he cannot produce it at once, and his expectation to be able to produce it within a reasonable time should be alleged.<sup>1</sup>

A request for a continuance in order to procure witnesses to a certain fact, may be properly met by the arbitrators by an offer to hear the rest of the case at once, and then to adjourn for a sufficient time to enable the party to procure and introduce these witnesses.<sup>2</sup>

**Erroneous Refusal to adjourn.**— If, by the unreasonable refusal by the referees of an apparently just and *bona fide* request for an adjournment, the party loses the opportunity to produce material evidence,<sup>3</sup> or any other substantial advantage to which he is entitled, as for example, the privilege of obtaining counsel,<sup>4</sup> the report or award will be set aside.

**Adjournments in Case of Absence.**— A portion of the arbitrators or referees only, in the absence of the rest, have no power to adjourn, inasmuch as they have no power to do any act whatsoever.<sup>5</sup> But if arbitrators fail to attend at the time and place set for a meeting, they may call another session, unless some limitation of time or other objection arising out of the terms of the submission should prevent.<sup>6</sup>

**All the Arbitrators must act together during the Proceedings.**— It is an imperative rule that where the submission is to several arbitrators jointly, all must act together during the proceedings. English and American authorities are alike agreed upon this. All must be present throughout each and every

<sup>1</sup> Latimer v. Ridge, 1 Binn. 458.

<sup>2</sup> Madison Ins. Co. v. Griffin, 3 Ind. 277.

<sup>3</sup> Passmore v. Pettit, 4 Dall. 271; Forbes v. Frary, 2 Johns. Ca. 224; Coryell v. Coryell, Coxe, 385.

<sup>4</sup> Whatley v. Morland, 2 Dowl. 249.

<sup>5</sup> Harris v. Norton, 7 Wend. 534; Jackson v. Ives, 22 Wend. 637.

<sup>6</sup> Harrington v. Rich, 6 Vt. 666.

meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefit of the views, arguments, and influence, of each one of the persons whom they have chosen to judge between them ; and they are entitled to these, not only in the award, but at every stage of the arbitration.<sup>1</sup>

In the cited English case of *Plews v. Middleton*, the referees agreed to carry on their inquiries apart, and to examine the witnesses separately, and, if they should all come to the same conclusion, to decide accordingly. The court held that such a course of proceeding would not be sanctioned in any instance, and that an award based upon facts ascertained in this manner would be regarded as procured by "undue means," and would be set aside ; for that such a mode of examination was a departure not only from established courses of procedure, but from natural justice.

No exception to the general rule obtains even where a statutory provision or a stipulation in the submission declares that the award of a majority shall be binding. All must nevertheless meet both for hearing and consultation ; and the fact that the hearing or consultation has been conducted in whole or in part by a majority only will suffice to avoid the award. It is one thing to agree to be bound by the decision which a majority shall come to, and quite a different thing to agree that only a majority need give their attention to the case. The rule is the same whether the tribunal be arbitrators or referees. The award may be made by a part, but the submission is to all. The opinions and arguments of one may have such an effect upon the rest that he will turn them to his view of the case.

<sup>1</sup> *Smith v. Smith*, 28 Ill. 56 ; also all the American cases cited in the note next after this ; and the following English cases : *Plews v. Middleton*, 6 Q. B. 845 ; *Little v. Newton*, 9 Dowl. 437 ; 2 Man. & Gr. 351 ; *Stalworth v. Inns*, 2 Dowl. & Low. 428 ; *Lord v. Lord*, 5 El. & Bl. 404 ; 26 L. J. Q. B. 34 ; *Beck v. Jackson*, 1 C. B. N. s. 695 ; *Morgan v. Bolt*, 1 N. R. 271.

The parties have stipulated for the benefit of the thought and consideration of each of the arbitrators and for the influence of each upon the rest; and that which the parties have stipulated for they must have, if the award is to be upheld.<sup>1</sup>

It has even been held that unless all the arbitrators meet together to inspect and sign the award, after it has been drawn up, it will be avoided by their neglect so to do.<sup>2</sup> This is certainly carrying the rule to a point beyond what reason would seem to require. It is probable that so rigid a doctrine would throw out many awards, which justice would require should be upheld. Yet the same adjudication has been rendered in the English tribunals. It was said that the award should be reduced to writing by the common consent of the arbitrators, and by them jointly executed. This was on the principle that the law required that every judicial act done by several should be completed by them in the presence of each other, and that in the case of arbitrators it was possible that at the last moment one might change his opinion.<sup>3</sup> In an earlier case the Court of Common Pleas had been inclined to doubt whether it was essential that the signatures should be affixed by each of two arbitrators in the presence of the other.<sup>4</sup> But the later cases already cited must be regarded as conclusively overruling this doubt.

A leading Massachusetts case is to the contrary effect. There were three arbitrators. At the consultation for determining upon the award two were agreed. The third dissented. Thereupon, one of the two concurring arbitrators wished to take

<sup>1</sup> *Thompson v. Mitchell*, 35 Maine, 281; *Brower v. Kingsley*, 1 Johns. Ca. 334; *McInroy v. Benedict*, 11 Johns. 402; *Howard v. Conro*, 2 Vt. 492; *Ackley v. Finch*, 7 Cow. 290; *Blin v. Trimble*, 2 Tyler, 304; *Hoff v. Taylor*, 2 Southard, 829; *Carpenter v. Wood*, 1 Metc. (Mass.) 409; *Short v. Pratt*, 6 Mass. 496; *Walker v. Melcher*, 14 id. 148; *Maynard v. Frederick*, 7 Cush. 247; *Harris v. Norton*, 7 Wend. 534.

<sup>2</sup> *Moore v. Ewing*, Coxe, (N. J.) 144.

<sup>3</sup> *Stalworth v. Inns*, 2 Dowl. & Low. 428; 13 Mee. & W. 466; *Wade v. Dowling*, 4 El. & Bl. 44; *Eads v. Williams*, 24 L. J. Chy. 531 (*per* Lord Chancellor Cranworth); and see *Wright v. Graham*, 3 Exch. 131; *Anning v. Hartley*, 27 L. J. Exch. 145.

<sup>4</sup> *Little v. Newton*, 9 Dowl. 437.

more time to consider the matter and asked a delay of two or three days. At the end of that period he signed the award, which had been already signed by the arbitrator who agreed with him. The court held that the signature at this time had "the same effect as if it had been done when all were present." <sup>1</sup>

A statement in the award that all met is sufficient. <sup>2</sup>

**How Objection that all have not acted together may be availed of.**— If the report is returnable into court, the objection that all the referees have not acted together may be availed of either by motion to set aside the report, <sup>3</sup> or as a reason why the court should not accept it upon application. <sup>4</sup> If the award is made by arbitrators *in pais*, the defect would unquestionably be a good ground for a bill in equity to declare the award void. Probably, also, the fact could be averred and proved in a suit at law on the award, by analogy to the practice where want of notice or excess of authority are relied on; though I find no case where this point of practice is discussed or determined.

**Withdrawal or Refusal of an Arbitrator to act with his Fellows.**— A necessary exception to the foregoing rule is raised by the refusal or neglect of an arbitrator to attend and act with his fellows. <sup>5</sup> But it is obvious that the exception can extend only to cases where a majority of the arbitrators have authority to make a binding award. None of the adjudications cover the case where unanimity in the award is necessary, and it is clear that there would be an intrinsic impossibility in their doing so, since an unanimous award could not be obtained under such circumstances; unless indeed an arbitrator who had not been present at the meetings should blindly adopt and sign the

<sup>1</sup> Maynard v. Frederick, 7 Cush. 247.

<sup>2</sup> Thompson v. Mitchell, 35 Maine, 281.

<sup>3</sup> McInroy v. Benedict, 11 Johns. 402; Harris v. Norton, 7 Wend. 534.

<sup>4</sup> Howard v. Conro, 2 Vt. 492.

<sup>5</sup> Kingston v. Kincaid, 1 Wash. C. C. 448; Cumberland v. North Yarmouth, 4 Greenl. 459, see p. 468; Kunckle v. Kunckle, 1 Dall. 364; Schultz v. Halsey, 3 Sandf. 405; and cases cited *post* in the further discussion of this subject.

award agreed upon by his co-arbitrators, and this very proceeding, as will be seen directly, would of itself invalidate the award.

In *Maynard v. Frederick*,<sup>1</sup> there was a regular meeting of the arbitrators for the purpose of coming to a decision. At this meeting two were agreed; a third "refused to assent to or to sign the award." One of the two then asked for a delay of a day or two for further consideration, at the end of which time, without any further meeting, he signed the award. The court said that after the absolute refusal of the third or dissenting arbitrator to sign the award to which the other two had agreed, "it was no longer necessary to consult or even meet with the dissenting arbitrator."

The decision in the last case was founded upon the earlier cause of *Carpenter v. Wood*.<sup>2</sup> In that case the three referees had two meetings for consultation. At the first, two differed from the third; at the second the difference was even more wide; and then the dissenting arbitrator said he should do no more with the other referees about it, and that *he should not sit with them any more*<sup>3</sup> because they could not agree about the award. An award subsequently signed by the two concurring arbitrators was upheld. The court considered that the dissenting arbitrator had voluntarily withdrawn, and that notice to him of a subsequent meeting for making an award, would have been a work of supererogation if not of impertinence. In this case and also in *Walker v. Melcher*,<sup>4</sup> it was remarked, as an important fact, that the dissenting referee had been present at the hearings.

It has been said in New York that there can be no doubt, under a submission to three arbitrators requiring the award to be signed by them "or any two of them," that at common law two might lawfully meet and hear the parties, after the third

<sup>1</sup> 7 Cush. 247.

<sup>2</sup> 1 Metc. (Mass.) 409; *Short v. Pratt*, 6 Mass. 496.

<sup>3</sup> The italics are so written in the opinion.

<sup>4</sup> 14 Mass. 148.

had been notified and had refused to attend and share in the proceedings. The award of the two would be valid and binding.<sup>1</sup> The theory adopted was that by the quoted clause of the submission the entire authority was disjoined, so that the majority were empowered to hear as well as to determine. Such, it was said, would still be the law in the State of New York were it not that a statute (2 R. S. 542, § 7) had come in and changed it by providing that "all the arbitrators must meet together and hear all the proof and allegations of the parties," though a majority may award unless otherwise agreed by the parties.

Russell lays down the same rule as constituting the law in England. "Under such a submission," he says, using the very language of the court in the cited case of *Dalling v. Matchett*, "it will be sufficient for any two of the arbitrators to act jointly, though the third from obstinacy, or the desire of a party, or business, or any other cause, absent himself from the meetings, provided he have full notice and opportunity of being present at them if he please, and be not kept away by any practice of the other arbitrators or of the parties."<sup>2</sup> "Otherwise," as the court added in the same cause, "it would be in the power of one of the parties to trick the other and entirely to defeat him of the benefit of the reference." "This latter remark," it has been said in a Massachusetts case, "would apply more strongly where one of the referees should withdraw after the hearing before all of them."<sup>3</sup>

After a submission has once been entered into, it is not in the power of one of the arbitrators to annul or avoid the agreement by withdrawing from the trust.<sup>4</sup> But this rule,

<sup>1</sup> *Per* Johnson, J., in *Bulson v. Lohnes*, 29 N. Y. 291; *Green v. Miller*, 6 Johns. 39; *Crofoot v. Allen*, 2 Wend. 495.

<sup>2</sup> Russell on Arb. 3d ed. p. 210; *Goodman v. Sayers*, 2 J. & W. 242; *Dalling v. Matchett*, Willes, 215; *Barnes*, 3d ed. 57; *In re Morphett*, 2 Dowl. & Low. 967; *Young v. Bulman*, 13 C. B. 623.

<sup>3</sup> *Carpenter v. Wood*, 1 Metc. (Mass.) 409.

<sup>4</sup> *Ibid.* And see *Phippen v. Stickney*, 3 id. 384.



though laid down generally by the court in the Massachusetts case cited, must necessarily be confined to cases where the majority may award. For if all must unite in the award it is clearly in the power of one refusing to proceed, to annul the submission.<sup>1</sup>

**The Refusal or Withdrawal must be Distinct and Final.**—The refusal to act, or the withdrawal of an arbitrator, is usually the result of a disagreement with his fellows and his total despair of ever being able to come to an agreement with them. In such cases it is necessary that the refusal or withdrawal be a distinct and unmistakable fact; also that it be not virtually revoked by subsequent renewed efforts to consult and come together.

At a meeting of three arbitrators one dissented from the award upon which the other two were agreed, and declared that if they would not change their views they must make the award for themselves, for he would not join in it. Afterwards, however, a draft for a new award, different from that first proposed, was sent, though by mistake, by the two to the third and was by him returned to them with comments and objections. But after communications had been thus again opened, the two made an award corresponding with that first proposed, and without notification or further consultation with the dissenter. The court set aside this award, saying that after the two had received the objections and comments of the third upon the second draft, they were bound to consider them, to consult with him, or at least to hear what he had to say in support of his emendations. Had the two made their award at once upon the withdrawal of the third and before subsequent discussion had been opened with him, the court intimated that it might have been good.<sup>2</sup>

**But it need not be Formal.**—But though the refusal or withdrawal must be certain and complete, it need not be made in any

<sup>1</sup> *Little v. Newton*, 2 Man. & Gr. 351; *Stalworth v. Inns*, 2 Dowl. & Low. 428.

<sup>2</sup> *In re Pering v. Keymer*, 3 Ad. & El. 245.

set form of words;<sup>1</sup> nor indeed need it be made by words at all. Any act of indubitable import, whereby an arbitrator abandons the task and separates himself from the rest, so that his intention cannot be questioned, will suffice. In *Kingston v. Kincaid*,<sup>2</sup> the referees often met, but agreement becoming apparently hopeless, one of them said that since they could not agree it was needless to call him again, and thereupon withdrew from the meeting. An award made by the other two, without further notification to him, was upheld as valid.

Again, where, upon consultation, two referees agreed and a third said he disagreed with them, and they might make their report without him, their report subsequently made without further notice to him was upheld.<sup>3</sup>

So where one of three arbitrators, having been duly notified to attend, wilfully and without cause absented himself, it was held "to be settled" that the others might proceed with the hearing.<sup>4</sup>

**Rule where a Third Arbitrator is called in.**—The rule where a third arbitrator is called in is shown by the following case: Two persons originally chosen as arbitrators, failed to agree, and called in a third arbitrator. Each of the first two drew up a written statement of his opinion, and delivered it to the third. After examination of these the third arbitrator and the one whose opinion he preferred met together and made an award. It was set aside because there had been no consultation between the three together concerning it. For, it was said, it was by no means certain that the arguments of the third arbitrator might not have produced unanimity between the original two; also the one whose views were rejected had the right to discuss the award with the other two. Though, it was said, if he had been notified of a meeting and had failed

<sup>1</sup> *Carpenter v. Wood*, 1 Metc. (Mass.) 409.

<sup>2</sup> 1 Wash. C. C. 448.

<sup>3</sup> *Kunckle v. Kunckle*, 1 Dall. 364.

<sup>4</sup> *Crofoot v. Allen*, 2 Wend. 494; citing *Green v. Miller*, 6 Johns. 39, which, however, seems not properly an authority to this point.

to attend, his withdrawal would have been final, and the award then made by the two would have been good.<sup>1</sup>

Where there is no refusal to act, two cannot make the award without first obtaining the opinion of the third. But if after consultation and comparison of views it appears impossible for them to agree, then of course the two may award.<sup>2</sup>

In Alabama it is said that the previous dissent of one from the opinion of the rest increases rather than diminishes the necessity for notifying him of the meeting for making up the award.<sup>3</sup> But this case extends only to the requisition of *notice*.

**Withdrawal or Refusal before the Proceedings are begun.**— If the withdrawal or refusal to act occurs at the outset, before any hearing has been had or any attempt at agreement can have been made or can have failed, it might reasonably be said that the tribunal chosen by the parties has been so far changed that they can no longer be bound by its decision. Authorities for this rule can be found only where references have been made by rule of court to referees. Then, though a majority may make a valid report, yet if one of the number refuses altogether to share in the proceedings and withdraws and absents himself from the beginning, the rule is said to be thereby discharged.<sup>4</sup>

The rule is the same, where, after a recommitment, the referees are obliged to start upon the hearing and consideration of the matter *de novo*. In this connection the case of *Cumberland v. North Yarmouth*<sup>5</sup> deserves to be stated. A report of referees was recommitted. The chairman thereupon refused to notify a meeting or to meet at the time and place

<sup>1</sup> *In re Templeman & Reed*, 9 Dowl. 962.

<sup>2</sup> *White v. Sharp*, 12 Mee. & W. 712; *Sallowes v. Girling*, Yelv. 203; Cro. Jac. 277; 1 Brownl. 112; *Berry v. Perry*, 3 Bulst. 62; *Thomas v. Harrop*, 1 Sim. & St. 524.

<sup>3</sup> *McCrary v. Harrison*, 36 Ala. 579.

<sup>4</sup> *Boardman v. England*, 6 Mass. 70.

<sup>5</sup> 4 Greenl. 459.

appointed by his colleagues. The others therefore met, and returned a second report very different from the former. A majority of the court, Mellen, C. J., dissenting, set aside the report by reason of the withdrawal of the chairman. The referees, it was said, derived their authority to adjudicate from the assent of the parties, and the assent of the plaintiffs (the losers under the report) may have depended upon the confidence they reposed in the judgment and integrity of the chairman of the referees. To oblige them to abide by a decision reached at a meeting at which he was not present, would be to subject them to the determination of a tribunal differently constituted from that to which they had submitted.

**Refusal or Withdrawal after Recommitment.**— If after a recommitment an arbitrator or referee refuses to attend further hearings, but the majority either hear or consult or both, and then return again an award or report identical with the previous one, it will be upheld.<sup>1</sup> The authorities are unanimous, though some of the adjudications seem to have been rather reluctantly and dubiously arrived at. But if the award or report differ in any respect whatsoever from its predecessor, it will be void.<sup>2</sup>

If, after having once undertaken the trust, one of the referees in a pending cause refuses to re-examine the subject after recommitment, it is said that the court may enforce obedience by attachment or *mandamus*; though it is believed, said the judge, in 1827, that no precedent can be found of a resort to such a process in a case of this kind, and it would be a more eligible course to discharge the rule.<sup>3</sup>

A rule of reference will not be discharged on the ground of the refusal of one of the referees to act, unless that fact is substantiated by affidavits, and due notice of the application has been given to the other party.<sup>4</sup>

<sup>1</sup> *Peterson v. Loring*, 1 Greenl. 64; *May v. Haven*, 9 Mass. 325.

<sup>2</sup> *Cumberland v. North Yarmouth*, 4 Greenl. 459.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Seamans v. Pharo*, 1 South, 123.

**Silence of Award concerning Joint Action.**—When it does not appear upon the face of the report that all the referees met together and heard the parties, it will nevertheless be presumed that they did so, if nothing appear to the contrary.<sup>1</sup> It was so declared even in a case where three referees had been named, but two only subscribed the report, which stated that “*the subscribers*” had met, &c.<sup>2</sup>

But it has been held in Vermont and Massachusetts, that it must be recited in the award, especially if it be signed by a majority only of the arbitrators, that all of them attended the hearings ; or at least that they were all notified.<sup>3</sup>

The rule is different in New York. A submission to three arbitrators authorized an award by two. The award, signed by two only, did not state whether or not all the arbitrators heard the cause. In suit, it was objected that it did not appear that all heard the cause. Proof that all did hear it was thereupon offered and rejected. Upon appeal, the Supreme Court overruled this decision, saying, “It is apprehended that no case can be adduced showing the necessity of this fact appearing in the award itself. To prove it by parol does not contravene any adjudged principle in the exposition of awards. It neither impeaches nor supports its merits ; but supplies a fact necessary to be determined, not affirmed or denied by the award, and which perhaps it was not the duty of the arbitrators to notice. If, in this case, one of the arbitrators had not met and arbitrated with the other two, would it not be competent to prove it, and thereby show what a defendant is always entitled to show in a court of law, that the award is not within the submission ? The court ought to have received the testimony offered. Had it shown that all the arbitrators heard the cause, the award was valid.”<sup>4</sup>

<sup>1</sup> *Yates v. Russell*, 17 Johns. 461 ; *Brower v. Kingsley*, 1 Johns. Ca. 334 ; *Maynard v. Frederick*, 7 Cush. 247.

<sup>2</sup> *Yates v. Russell*, 17 Johns. 461 ; *Schultz v. Halsey*, 3 Sandf. 405.

<sup>3</sup> *Blin v. Trimble*, 2 Tyler, 304 ; *Short v. Pratt*, 6 Mass. 496.

<sup>4</sup> *Ackley v. Finch*, 7 Cow. 290.

In *Short v. Pratt*,<sup>1</sup> the statute under which the proceedings were had required that it should appear on the record that the report of the referees was made pursuant to the statutory provisions. On the strength of this the court held that where a report was made by a majority of the referees only, it must appear upon the record that the hearing had been by all, since such a hearing was called for by the statute.

**The Rule that all the Arbitrators must unite in the Award.**— Unless the statute or the submission, under which the arbitrators act and derive their authority, provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid.<sup>2</sup> A different rule is allowed to prevail in matters of public concern. Where persons are charged with the performance of public duties, the decision of a majority is usually accepted. So it is with a bench of judges, where the concurrence of a majority constitutes the decision of the court. But a submission to arbitration is a “delegation of power for a mere private purpose,” and the “concurrence of all interested with the power is necessary to its due execution.”<sup>3</sup> The rule is thoroughly established both in England and in the United States.

The submission, however, or the statute under which the arbitrators derive their power, may of course stipulate or declare that an award concurred in by a majority shall be valid.

<sup>1</sup> 6 Mass. 496.

<sup>2</sup> *Maynard v. Frederick*, 7 Cush. 247; *Towne v. Jaquith*, 6 Mass. 46; *Cope v. Gilbert*, 4 Denio, 347; *Nettleton v. Gridley*, 21 Conn. 531; *Reeves v. Goff*, 1 Pen. 143; *Howard v. Pollock*, 1 Yeates, 509; *Rhodes v. Baird*, 16 Ohio St. 573; *Mackey v. Neill*, 8 Jones, Law, 214; *Quimby v. Melvin*, 28 N. H. 250; *Knowlton v. Homer*, 30 Maine, 552; *Grindley v. Barker*, 1 Bos. & Pul. 229; Vin. Abr. Authority, B.; *Rex v. Whitaker*, 9 Barn. & C. 648; *Crawshay v. Collins*, 3 Swanst. 90; *contra*, *Black v. Pearson*, 1 M'Cord, 137.

<sup>3</sup> *Green v. Miller*, 6 Johns. 39; *Patterson v. Leavitt*, 4 Conn. 50; *Russell on Arb.*, 3d ed. p. 207.

**Award by Majority.**—The authorization of a majority to make a valid decision, need not always be made in distinct terms. If it can be clearly gathered from a necessary implication, it may suffice. For example, where the submission is to two, with a provision that in case they cannot agree a third is to be called in, it is an inevitable inference that the decision of two out of the three will be binding, and an award made by two will be upheld as valid.<sup>1</sup> An agreement that the award shall “be made up by the referees or by a majority of them,” expresses with certainty not alone that a majority only must join in the actual execution of the instrument, but also that a majority only need agree in the decision.<sup>2</sup>

In the following somewhat peculiar case unanimity was dispensed with. A. signed a written contract to sell certain land to B., “on such terms as the witnesses to this instrument shall decide to be just and reasonable.” There were three witnesses. B. did all in his power to procure an award fixing the amount to be paid by him. Two of the three arbitrators agreed on a price, but the third, though present at the meeting and sharing in the discussion, refused to agree or to sign the award. The court said that the act of any one of the three persons selected as arbitrators, in refusing to concur with his associates in fixing the sum to be paid, ought not to be allowed to operate to divest B. of his rights under the contract; that if the sum to be paid by the plaintiff, before he was entitled to the conveyance, could not be adjusted in the manner contemplated by the parties, the effect must be that he must pay for the land such a sum as was reasonable and such sum as the arbitrators ought to have awarded.<sup>3</sup> The action, however, was not for specific performance, so that the court had no occasion to adopt any course for fixing upon a price, and decreeing a conveyance to be made. The demand was for damages for breach

<sup>1</sup> *Batley v. Button*, 13 Johns. 187.

<sup>2</sup> *Maynard v. Frederick*, 7 Cush. 247.

<sup>3</sup> *Phippen v. Stickney*, 3 Metc. (Mass.) 384.

of the contract by A., and it was held that damages were recoverable.

**The Rule concerning Referees.**—A contrary rule holds good in the case of referees, and the report of a majority of them is valid. For they are at least *quasi* public officers, persons appointed under a general statute to perform a judicial duty.<sup>1</sup>

**Time of expressing Dissent.**—The dissent of an arbitrator from the award of his fellows must be expressed at or before the time of publication. If he unites with them in making the award, or is present at the publication and pronounces the award to be the decision of the arbitrators, it has been held that evidence going to show that, as matter of fact, he differed in opinion from the others, is entitled to no weight.<sup>2</sup>

**Unanimity in each Incidental Question is Unnecessary.**—All the arbitrators need not, however, agree upon each incidental question which arises in the course of the proceedings, as to the admission of evidence or other points of practice. If they all hear the cause and finally concur in the award, it is sufficient.<sup>3</sup>

An obvious and inevitable necessity has also led to the rule that if each arbitrator exercises his own independent judgment on the matter submitted, it is no objection to the award that one gives way to the other ; since in case of any difference of opinion arising an agreement and determination could be reached in no other way.<sup>4</sup> But this must not be confounded with the rule forbidding one arbitrator to delegate his authority to his coadjutor, and accept the opinion of another as his own ; a matter which will be discussed hereafter.

The unanimity must, however, be *bona fide*. If one of the arbitrators deliberately violates his own convictions, and signs

<sup>1</sup> Billington v. Sprague, 22 Maine, 34 ; Petition of Farwell, 2 N. H. 123 ; Eastman v. Burleigh, ib. 484 ; Lockhart v. Kidd, 2 Rep. Const. Ct. 217. But to a contrary effect is an old case, Tetter v. Rapesnyder, 1 Dall. 293.

<sup>2</sup> Jackson v. Gager, 5 Cow. 383 ; Cox v. Jagger, 2 id. 638 ; Campbell v. Western, 3 Paige, 124.

<sup>3</sup> Campbell v. Western, 1 Paige, 124 ; Bean v. Wendell, 22 N. H. 582 ; Campbell v. Western, 3 Paige, 124.

<sup>4</sup> Eardley v. Steer, 4 Dowl. 423.



an award which he believes to be unjust, his conduct will vitiate the award. Where, in a reference to surveyors to settle the terms of the lease of a mine, they, relying upon the judgment of an expert, valued it at 400*l.* per acre, but one of the surveyors said that he did not think it worth 200*l.* per acre, but concurred in the award because he thought it no use differing, Lord Chancellor Cranworth held the award bad because this surveyor had not exercised a judicial decision upon the case, not having adopted as his own the opinion given by the expert, but merely subscribing what he in fact thought wrong because another person thought it right.<sup>1</sup>

**Process of coming to Agreement.**—A kindred doctrine is, that the process by which arbitrators come to an agreement is of no consequence, and cannot be inquired into by the court, neither be made a basis to vacate their award. Thus where several questions are contained within the submission, though the arbitrators differ as to some of them, yet if, by different courses, they all come to an agreement upon the sum total, the award shall stand. And where they have made up their award upon a general consideration of all the items presented, and in view of the substantial equity of the whole matter, it makes no difference that in reaching this conclusion they threw out a single item which both parties had agreed to admit.<sup>2</sup>

**Some Judicial Discretion must be exercised.**—But it seems to be essential that the arbitrators should have exercised some degree of judgment and discretion, and if it should appear that they have not done so, their award may be rejected. Thus where the value of a water-privilege was to be determined, the referees were of different opinions. Thereupon each party was summoned before them and gave his own opinion of the value, and the arbitrators shortly afterward awarded a

<sup>1</sup> *Eads v. Williams*, 24 L. J. Chy. 531.

<sup>2</sup> *Bean v. Wendell*, 22 N. H. 582; *Campbell v. Western*, 1 Paige, 124; *Brown v. Bellows*, 4 Pick. 179.

sum which was precisely the mean between these two opposing valuations. The court said that if the award of this sum was based solely upon the fact that it was the exact mean between the sums named by the disputants, it would be bad ; but if (as was assumed) the arbitrators had really exercised their own judgment and thought their determination was right, then that the award should stand ; that the fact that the sum was a middle sum did not by any means prove a want of independent judgment ;\* that the inquiries from the parties as to their opinions was perfectly proper if made to assist the the arbitrators' judgment, and not for the naked purpose of dividing the difference.<sup>1</sup>

**Delegation of Authority by an Arbitrator, and Agreements to accept the Decision of Another.** — To the rule that each arbitrator must exercise his own independent judgment upon the matters submitted, is appended as a necessary corollary the rule that no arbitrator can delegate his authority to another or can elect another to act with him, except, of course, where he is specially authorized by the submission so to do.<sup>2</sup> He has an authority from another to do an act for him, and he is within the grand doctrine of the law, *delegatus non potest delegare*.

This principle is so strictly enforced that it extends even to a delegation made by one to his co-arbitrator, which is held to be no less fatal in its effect upon the validity of the award than a delegation to an entirely outside person. Thus where a submission was to two merchants and one lawyer, and the three agreed upon an award subject only to the decision of the lawyer upon a point of law, and he examined into the point of law, made up his opinion upon it, and drew the award in the manner which had been arranged upon, and it was subsequently executed in this shape by a majority, the court never-

<sup>1</sup> *Brown v. Bellows*, 4 Pick. 179.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 198 *et seq.* ; *Lingood v. Eade*, 2 Atk. 501 ; *Proctor v. Williamson*, 29 L. J. C. P. 157 ; 8 C. B. N. s. 386.

theless set it aside on the ground that it was impossible to say but that, had the lawyer stated his opinion before the award was made, his co-arbitrators might not have advanced some arguments which would have produced a different result from that at which he arrived in drawing the award alone.<sup>1</sup>

But if two appraisers, in selecting a third to act with them, agree beforehand to concur in his decision, whatever it may be, the resulting award would be void. But if, after having made such an improper agreement, they in fact disregard it, and all three really act together in determining a value, their award will be good.<sup>2</sup>

So also it has been held in England that if the arbitrators agree together beforehand to be bound by the opinion of a third person, and do accordingly adopt his opinion as their award, without exercising any judgment of their own in the premises, the award will be set aside.<sup>3</sup>

But Russell says, "The cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers."<sup>4</sup>

Thus, where the arbitrators had acted with the umpire, the court sustained the award, because the umpire was at liberty to take what advice or opinion or assessors he would.<sup>5</sup> And so it has been held in the House of Lords that an arbitrator may consult men of science, when it is necessary.<sup>6</sup>

In *Emery v. Wase*,<sup>7</sup> it was objected that the arbitrator had not used his own judgment in valuing certain lumber. Lord Alvanley, M. R., said, "That alone is not sufficient to prove

<sup>1</sup> *Little v. Newton*, 9 Dowl. 437.

<sup>2</sup> *Haff v. Blossom*, 5 Bosw. 559.

<sup>3</sup> *Whitmore v. Smith*, 5 Hurl. & Nor. 824; 29 L. J. Exch. 402; in error, 31 id. 107; 7 Hurl. & Nor. 509.

<sup>4</sup> Russell on Arb., 3d ed. p. 199.

<sup>5</sup> *Soulsby v. Hodgson*, 3 Burrows, 1474.

<sup>6</sup> *Caledonian Railway Company v. Lockhart*, 3 Macq. 808

<sup>7</sup> 5 Ves. Jr. 846.

the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he choose to adopt it." On appeal Lord Chancellor Eldon said he did not mean to determine that referring this valuation to be made by another was sufficient cause for refusing to order a specific performance of the award.<sup>1</sup>

Two land surveyors to whom was referred the valuation of an estate, not being accustomed to value houses, called in two builders to value the mansion-house. Vice-Chancellor Leach held this was unobjectionable, since they had not agreed beforehand to be bound by the decision of the builders, but had received it merely as evidence, and had adopted it because they were satisfied of its accuracy.<sup>2</sup>

Lord Lyndhurst has since held that an arbitrator has power, without any especial provision, to call in a valuer to assist him.<sup>3</sup> Though, if there be a provision for his doing so, that will supersede his general power, and he can act only under and by virtue of it.<sup>4</sup> It was also held in the same case that, where the arbitrators were specially empowered to call in a valuer of partnership stock and property, it was no objection to the award that they availed themselves of the assistance of the same person in deciding on the partnership accounts. For by adopting his opinions they did not make him their umpire, but only made his opinions their own, which they had a right to do.<sup>5</sup> But as in *Hopcraft v. Hickman* (*supra*) the valuer's opinion is treated as evidence, so it is to be noted that in this case Lord Brougham stated that the proper and more regular course, and one which a professional arbitrator would have followed, would have been to have examined as a witness the person of whose experience, by the

<sup>1</sup> 8 Ves. Jr. 504 *a*.

<sup>2</sup> *Hopcraft v. Hickman*, 2 Sim. & St. 130.

<sup>3</sup> So held also in *Caledonian Railway Company v. Lockhart*, 3 Macq. 808.

<sup>4</sup> *Anderson v. Wallace*, 3 Cl. & Fin. 26.

<sup>5</sup> *Ibid*.

terms of the submission, the arbitrators might avail themselves.

The theory is sufficiently plainly developed in these English cases that the arbitrator may, for his own information and guidance, ask information from persons whose capacity to form an accurate opinion concerning the subject-matter he relies upon; that the statements thus obtained by him are to be treated as evidence or as aids by which he may make up his own opinion. He may give them such weight and credence as he sees fit, even to the point of founding his judgment upon them; but it is essential that he *should* form his judgment, and not adopt and follow them absolutely, blindly, or in contravention of an actual opinion of his own. The process resembles the taking of expert testimony; though it differs in the one essential particular, that the arbitrator may make these investigations privately without notice to or presence of the parties.<sup>1</sup>

Where surveyors were to settle the terms of a lease of a mine, and an expert was sent down into the mine to examine and value it, it was held that an adoption by the surveyors of his opinion as their own, on this point of value, was not an objection to the validity of their award.<sup>2</sup>

There is an American case in which it has been held that referees may make inquiry abroad to ascertain, for their own satisfaction, the price of work, or the truth concerning any other matter which may be said to be of a comparatively public nature.<sup>3</sup>

**Delegation of purely Ministerial Acts or Functions.**— A distinction is very properly taken between acts of a judicial and acts of a merely ministerial character. Though the arbitrator cannot delegate his power concerning the former, there is no doubt that he may concerning the latter.<sup>4</sup> The difficulty, as

<sup>1</sup> Russell on Arb., 3d ed. p. 202.

<sup>2</sup> Eads v. Williams, 24 L. J. Chy. 531

<sup>3</sup> Chaplin v. Kirwan, 1 Dall. 187.

<sup>4</sup> Russell on Arb., 3d ed. p. 204; Thorp v. Cole, 2 Cr. Mee. & Ros. 367; 4 Dowl. 457.

Mr. Russell observes, is not as to the accuracy of this doctrine, which is not questioned, but as to what may be treated as ministerial acts. The measurement of the superficial area of a field or lake have been held to be such;<sup>1</sup> and there would seem to be no doubt that the making up of accounts by a skilled accountant would properly fall within the same category.<sup>2</sup>

It seems to be established in England not only that an arbitrator may consult or employ counsel to assist him in framing his award,<sup>3</sup> but also that any one of several joint arbitrators may, by himself, obtain the opinion of counsel as to questions arising in regard to framing the award,<sup>4</sup> or even as to questions concerning the dispute itself.<sup>5</sup> Though the cases cited to the last two points made out, upon a statement of the circumstances, a strong equitable showing to the effect that no prejudice to either party, no partiality or secrecy, could be suspected.

In New Jersey it has been held that if, after they have fully determined upon what their decision and award shall be, the arbitrators feel doubtful of their own capacity to draft the award in legal and valid shape, they may call to their assistance, for this purpose only, even the counsel of the party in whose favor the instrument is to operate.<sup>6</sup> As a means of obtaining an award technically unimpeachable, this rule might reasonably be expected to prove efficient. But it is a dangerous doctrine to establish, since it must often lead into temptation men of questionable power of moral resistance.

**Waiver of Right to object for Incompetency or Irregularity.** — Many instances have already been mentioned in which it has been held that a party has, either in fact or presumably,

<sup>1</sup> *Thorp v. Cole*, *supra*; *Hunter v. Bennison*, Hard. 43.

<sup>2</sup> *Harvey v. Shelton*, 7 Beav. 455; *Moore v. Barnett*, 17 Ind. 349.

<sup>3</sup> *Dobson v. Groves*, 6 Q. B. 637; *Fetherstone v. Cooper*, 9 Ves. Jr. 67.

<sup>4</sup> *In re Hare*, 6 Bing. N. C. 158.

<sup>5</sup> *Goodman v. Sayers*, 2 Jac. & Walk. 249.

<sup>6</sup> *Moore v. Ewing*, Coxe, 144.

waived his right to object to an award either on the ground of the incompetency of the person selected to act as arbitrator, or on the ground of excess of authority or of irregularities in the proceedings before the arbitrator. A few other principles, however, remain to be stated concerning this topic.

The waiver usually grows out of acts or words of the party having the right to object.<sup>1</sup> It is obviously a matter of primary necessity, that at the time of doing these acts or speaking these words he should have a knowledge of the fact upon which his right to object is founded. Otherwise waiver, which is matter of intention, cannot take place.

It would appear that his ignorance of the fact disqualifying the person selected to act as arbitrator must be affirmatively proved by the party seeking to avoid the award on this ground. Otherwise his knowledge will be presumed, and as consequent thereupon, his waiver also will be presumed. In the cited case, the objection was on the ground of relationship between the arbitrator and the opposite party. The court said that "in the absence of all proof that he [the objector] had no knowledge of this connection," in addition to the fact that all objections to the proceeding had been based on other grounds — (though this would seem to suggest rather than to contradict the fact of ignorance) — the defence could not be allowed to prevail.<sup>2</sup>

**Waiver by Appearing and Proceeding.** — The general rule is that by appearing and proceeding before the arbitrators, after having obtained knowledge of the incompetency or irregularity, the party waives and loses his right to avail himself of this objection to the validity of the award. Silence operates as acquiescence or condonation. To proceed is to involve all concerned in loss of time and in expense, and also to take the chances of a favorable presentation of the case and a decision

<sup>1</sup> *In re Salkeld*, 12 Ad. & El. 767; *In re Jenkins*, 1 Dowl. N. S. 276; *Drew v. Leburn*, 2 Macq. 1.

<sup>2</sup> *Brown v. Leavitt*, 26 Maine, 251.

in his favor. The party will not be allowed, after putting himself and others in such a position, to refuse to abide by a result which proves unsatisfactory to him.<sup>1</sup>

The objection that witnesses are heard unsworn, if not taken at the time, is lost. Silence is acquiescence.<sup>2</sup>

Appearing and proceeding before an arbitrator has been held to constitute a waiver of any objection to the mode of his appointment.<sup>3</sup>

If an irregularity in the meeting of the referees, sufficient in itself to render the award void, has occurred, it will be cured by the subsequent appearance and proceeding of the parties.<sup>4</sup>

Appearing and proceeding before a substitute for the arbitrator named is a waiver of any objection to the substitution.<sup>5</sup>

Any defect in serving upon a party notice of a meeting is waived or cured by his appearing and proceeding at the meeting either in person or by counsel.<sup>6</sup>

An arbitration bond purported to bind three persons named as obligors, jointly and severally. It was signed by only two of them. These two proceeded to a hearing. An award was made against them, and the obligee sued one of them upon it. Apart from the result of the provision for joint liability, it was declared by the court that the two signatories by proceed-

<sup>1</sup> *Mitchell v. Wilhelm*, 6 Watts, 259; *Brooke v. Bannon*, 3 Watts & S. 382; *Cutter v. Whittemore*, 10 Mass. 442; *Fox v. Hazelton*, 10 Pick. 275; *Brown v. Leavitt*, 26 Maine, 251; *Maynard v. Frederick*, 7 Cush. 247; *Perry v. Moore*, 2 E. D. Smith, 32; *Norton v. Savage*, 10 Maine, 455; *Strong v. Strong*, 9 Cush. 560; *Valle v. North Missouri Railroad Company*, 37 Mis. 445; *Johnston v. Cheape*, 5 Dow (Parl.) 247; *Morgan v. Birnie*, 9 Bing. 672; *Owdy v. Gibbons*, Comb. 100; *Hewlett v. Laycock*, 2 Car. & Payne, 574; *Kingwell v. Elliott*, 7 Dowl. 423; *Bignall v. Gale*, 2 Man. & Gr. 830. But see *Dobson v. Groves*, 6 Q. B. 637.

<sup>2</sup> *Maynard v. Frederick*, 7 Cush. 247.

<sup>3</sup> *Mitchell v. Wilhelm*, 6 Watts, 259.

<sup>4</sup> *Dorman v. The Turnpike Company*, 3 Watts, 126; *Tracy v. Herrick*, 25 N. H. 381.

<sup>5</sup> *Browning v. M'Manus*, 1 Whart. 177; *Bemus v. Clarke*, 29 Penn. St. 251. But see *Russell v. Gray*, 6 Serg. & R. 145.

<sup>6</sup> *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Lattier v. Rachal*, 12 La. An. 695.



ing with the reference, though they knew that the third party had not signed the bond, had deprived themselves of the right to avail themselves of this fact as an objection to the validity of the award. By doing so they would render themselves guilty of having grossly misled the party of the other part, insomuch as they had allowed him to go on and establish his claims under the impression that the award, if in his favor, would not be disputed, and all the while they had retained a secret objection in their own minds of which they intended to avail themselves in the event of an unfavorable result.<sup>1</sup>

**Waiver of Stipulation as to Time.**— If the submission name a certain time within which arbitrators must be chosen, or the award must be made, this stipulation will be taken to be waived if the parties, after the lapse of the time named, choose arbitrators and proceed with the arbitration. Their action of this nature will amount to or have the effect of a substitution by agreement of the time when the trust is in fact executed by the arbitrators in place of the time originally stipulated.<sup>2</sup>

**Waiver is Matter of Apparent Intention.**— But the question of waiver is one of apparent intention. Wherefore the fact that a party, in order to prevent *ex parte* proceedings, continues to attend and conduct his case after the occurrence of an irregularity within his knowledge, does not necessarily amount to a waiver. If he has protested against the error, and his intention not to waive it is made obvious by his conduct, no waiver will take place.<sup>3</sup> In the cited case of *Davis v. Price*, a party, whose objection to the examination of certain witnesses had been overruled, protested, but attended and cross-examined the witnesses. *Held*, he had not waived the right to avail himself of the wrongful admission of this testimony. But it is possible for a party to waive even his protest, by proceeding with the arbitration, if an intention or

• •     <sup>1</sup> *Cutter v. Whittemore*, 10 Mass. 442.

<sup>2</sup> *Montague v. Smith*, 13 Mass. 396.

<sup>3</sup> *Haigh v. Haigh*, 31 L. J. Chy. 429; *Davies v. Price*, 10 W. R. 865.

willingness so to do is clearly to be inferred from the circumstances.<sup>1</sup>

**Waiver of Stipulations concerning the Form of the Award.** — So an agreement embodied in the submission as to the form in which an award shall be executed, published, or delivered, has been held to be waived by a subsequent “understanding between the parties,” proved by the testimony of the arbitrators.<sup>2</sup> And the delivery of a sworn copy of the award to each party, if the same be received without objection, will be regarded as a waiver of a right to receive the original.<sup>3</sup> Where parties had submitted by bonds, in which they required a written award, but subsequently and before award made they notified the arbitrators that they had executed other writings under seal in place of the written award, and that they did not wish the award in writing, but only wished to be informed verbally of the amount determined upon by the arbitrators in order that they might insert it in these writings, it was held that by these acts and directions they waived the requirement in the bond for a written award, and the verbal award was good.<sup>4</sup>

A stipulation for a written award may be waived so far as regards a part only of the several matters submitted.<sup>5</sup> And a stipulation in a submission that the award shall be returned into court and judgment entered thereon, is waived by the subsequent agreement of the parties made when the award is ready, that it may be opened *in pais*, by its being so opened and by each of them paying one-half the costs, according to its order in this respect.<sup>6</sup>

**Waiver by Ratification and Performance.** — After ratification of an award and execution of its requirements it is too late

<sup>1</sup> Christman v. Moran, 9 Barr, 487.

<sup>2</sup> Tracy v. Herrick, 25 N. H. 381

<sup>3</sup> Ibid.; Sellick v. Adams, 15 Johns. 197.

<sup>4</sup> French v. New, 20 Barb. 481.

<sup>5</sup> Tudor v. Scovell, 20 N. H. 174.

<sup>6</sup> Norton v. Savage, 10 Maine, (1 Fairf.) 455.

for the parties to set up any defect in the proceedings or in the award,<sup>1</sup> or any want of original authority in the persons acting as arbitrators to act as such.<sup>2</sup>

Where the statute required three referees unless a less number was agreed to, and in fact the hearing was had before one, it was held too late to object on this ground after award had been made.<sup>3</sup>

**Waiver of Departure from the Scope of the Submission.**—Where arbitrators were appointed to appraise certain personal property appurtenant to certain real estate, and the parties met with them and showed them the articles, and no dispute was made concerning any of the articles, it was held not to invalidate the award though some of the appraised chattels were not included in the submission, and though other chattels not appraised were included. The parties were considered to have waived the appraisement of the omitted articles, and to have agreed that the articles included in the appraisement, but not in the submission, were appurtenant to the estate, and were to be valued by the arbitrators.<sup>4</sup>

<sup>1</sup> *Reynolds v. Roebuck*, 37 Ala. 408; *Hoogs v. Morse*, 31 Cal. 128; and see *White v. Fox*, 29 Conn. 570; *Brown v. Bellows*, 4 Pick. 179.

<sup>2</sup> *Henneigh v. Kramer*, 50 Penn. St. 530.

<sup>3</sup> *McShane v. Gray*, 13 Iowa, 504.

<sup>4</sup> *Brown v. Bellows*, 4 Pick. 179.

## CHAPTER VI.

### THE ARBITRATOR'S AUTHORITY.

Source of the arbitrator's authority.

The arbitrator's action in excess of his authority.

Favorable presumptions.

General rules concerning an arbitrator's authority.

The arbitrator cannot go beyond the precise question submitted.

The arbitrator cannot modify the question submitted.

The arbitrator cannot do general equity.

Orders concerning price and payment.

Orders concerning allowance of interest.

The arbitrator's power in disputes between partners.

Power of arbitrator to order execution of a release.

Power to order conveyance of real estate.

Specifications concerning legal form, &c., of the conveyance

When conveyance need not be ordered.

Power of arbitrator in cases of land-damages.

Power to go behind a receipt in full.

Orders concerning incidental matters.

Power and duty to order what shall be done by a party in the future.

Validity of orders concerning future conduct of a party.

Orders concerning future acts will be sustained if possible.

Limitation of authority as to time past.

Orders concerning the persons and property of strangers.

Order that an act be done by a stranger.

Other non-enforceable orders.

Effect of performance of such non-enforceable orders.

Reference of cross-actions.

Arbitrators cannot name substitute.

The arbitrator's power in a *lis pendens*.

The arbitrator's power to allow amendments where the submission is in or of a *lis pendens*.

Limitations upon the power to allow amendments by the plaintiff.

Limitations upon the power to allow amendments by the defendant.

Power to consider a claim in offset.

The allowance of amendments is discretionary.

Who may object if the arbitrator exceeds his authority.

How the objection of excess of authority may be availed of; rules of pleading.

Evidence as to excess of authority.

The arbitrator is the final judge of both law and fact.

Whether or not the arbitrator ought to conform to strictly legal principles.

Power of arbitrator to save questions of law for the court.

An arbitrator may consider defences not strictly legal.

Rules of court practice.

**Source of the Arbitrator's Authority.**—If a submission be entered into *in pais* and not in a *lis pendens*, or under a statute, it constitutes the sole source of the arbitrator's power. From it, and only from it, is to be gathered the extent of his authority. In furtherance of this purpose, every part of the submission should be referred to, as, the preamble, the recital and the agreements or covenants, as well as the express delegations of powers; also all documents referred to in the submission in such a manner as to make it obvious that they are intended to be made a part of it, or that it is intended to be construed in connection with them.<sup>1</sup>

If the submission be statutory, the statute must of course be taken into consideration in determining the extent and nature both of the powers and of the duties of the arbitrators.

If the submission be made of or in a *lis pendens*, whether *in pais* or by rule of court, all the papers in the case form a part of the submission for the purpose of determining what it is that is submitted and what is the real question to be passed upon; also the rule of court, if there be one, may contain important intimations both upon this point and also concerning the powers and duties of the referees or arbitrators.

A dispute having arisen between two merchants as to a bargain between them, a correspondence ensued which resulted in an agreement to submit. This agreement was finally embodied in two letters, exchanged between them. The court, however, held that the entire correspondence, beginning with the letters in which the contract of bargain and sale was made, and including all the letters in which the project and terms of the submission were discussed, was admissible in evidence, so far as it was explanatory of the terms of the reference, and of what was intended to be submitted by the parties. And if any letters were withheld by the one party, it was said at the first trial, and not afterward denied, that the other party might

<sup>1</sup> Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131, pp. 170 *et seq.*

give evidence of their contents so far as they related to the reference.<sup>1</sup>

**The Arbitrator's Action in Excess of his Authority.**—It is peculiarly necessary to understand accurately in every arbitration the exact scope of the arbitrator's authority. For if he should chance in his award to exceed the powers which he may properly exercise, the effect will be fatal to the validity of the award,<sup>2</sup> save only where by good fortune the part constituting the excess is independent of and separable from the rest.<sup>3</sup>

A principle, constituting what may perhaps be regarded as an exception to the foregoing rule, has been laid down in New Hampshire. The sureties of the losing party in an arbitration objected that the arbitrators had exceeded their authority in allowing a certain claim against him. The court refused to entertain the objection, because it appeared that the claim had been subsequently paid and discharged by the debtor, and was, therefore, no longer a subsisting or possible claim against the sureties. And it was said generally, that though the court did "not feel called upon to question the correctness of the general principle laid down in *Adams v. Adams*,<sup>4</sup> viz., that the court will look only to the award itself for the means of rejecting a claim not submitted and therefore improperly allowed, yet we have no doubt that where it appears by the same evidence which proves the allowance of a demand not submitted, that the same demand has been paid or released or in any way discharged, that the award should not be set aside for that cause, in case the allowance of such claim has merely the effect to

<sup>1</sup> *Walsh v. Gilmor*, 3 Har. & J. 383.

<sup>2</sup> *Richardson v. Huggins*, 23 N. H. 106; *Cook v. Carpenter*, 34 Vt. 121; *Butler v. Mayor, &c.*, of New York, 7 Hill, 329; *Blanton v. Gale*, 6 B. Monr. 260; *Smith v. Kincaid*, 7 Humph. 28; *Howard v. Edgell*, 17 Vt. 9; *Adams v. Adams*, 8 N. H. 82; *Russell on Arb.*, 3d ed. p. 661. In this connection that portion of Chapter II. upon "The Submission," which discourses concerning the construction of the submission, should be also examined.

<sup>3</sup> See *post*, "Divisibility of the award; award good in part, bad in part."

<sup>4</sup> 8 N. H. 82.

increase the amount of the award against the party objecting, and the other party is satisfied. In such case the award should be held valid and effectual for the residue, just as a judgment exceeding the *ad damnum* of a writ will not be set aside for that cause in case the excess is remitted." So if the party in whose favor the claim has been wrongfully allowed releases this excess, the award is good for the balance.<sup>1</sup>

**Favorable Presumptions.** — It seems almost needless to remark that as the presumptions of law in suits concerning awards are always in favor of validity, so it is always presumed that the arbitrator has not exceeded his authority, unless the contrary appears on the face of the record, or is affirmatively shown. The following somewhat singular case shows how far this presumption will be carried; almost, indeed, to the point of presuming the entire contents of the submission itself. The submission could not be produced, and the only evidence of its extent consisted of a statement, embodied in the award, that it embraced "all matters in difference." Beyond this, the only evidence as to what these "matters in difference" in fact were, was the statement that the arbitrators "carefully considered all accounts and statements presented." An objection that the award did not follow the submission was overruled. The court said, "The intendments are in favor of the validity of an award as well as of a judgment. We must presume, in absence of evidence to the contrary, from the award or otherwise, that all matters passed upon were matters of difference, and that all matters of difference were passed upon."<sup>2</sup>

Where arbitrators are empowered to determine concerning partnership claims, the fact that certain claims laid before them and decided by them, are such that they might very naturally not be really partnership claims, does not suffice to

<sup>1</sup> Richardson v. Huggins, 23 N. H. 106.

<sup>2</sup> Lamphire v. Cowan, 39 Vt. 420; Myers v. York & Cumberland Railroad Company, 2 Curtis C. C. 28; Hayes v. Forskoll, 31 Maine, 112.

overthrow the favorable presumption. "The party who assails an award, must clearly go further than merely to show that the referees *may* have erred."<sup>1</sup>

**General Rules concerning an Arbitrator's Authority.**—The old rule laid down in Rolle's Abridgment is, that an arbitrator cannot bind a man's liberty, or his right to real property, where the submission is only concerning things personal. Wherefore an award that one party shall serve another for a certain term of years, or an award ordering a release of a right to lands where the claim is for damages for trespass, will be void. For since only personal estate could be taken on execution at common law, where the action was for a personal injury, so it was said nobody could be supposed to submit more than his personal estate in such a case.<sup>2</sup> The arbitrator may, of course, award money. It has also been said in some cases that he may award other chattels, as a horse or a quart of wine.<sup>3</sup> But this again has been denied, and it has been said that he could award a chattel, other than money, only if there was a controversy between the parties concerning such chattel.<sup>4</sup>

But where an arbitrator was empowered "finally to settle the differences," and an action had been brought for non-delivery of goods shipped on board the defendant's vessel, it was held that, after awarding compensation to the plaintiff for non-delivery, the arbitrator might direct that the defendants should keep the goods found to be in their possession.<sup>5</sup>

It seems that an arbitrator may order that one party shall beg pardon of the other. Though unless he name time and place, the award may be void for uncertainty.<sup>6</sup>

<sup>1</sup> Richardson v. Huggins, 23 N. H. 106.

<sup>2</sup> Rolle's Abr. Arb., B. 12, p. 248.

<sup>3</sup> Bac. Abr. Arb., E.; Purslow v. Baily, 2 Ld. Raym. 1039; 1 Salk. 76; 6 Mod. 221.

<sup>4</sup> Rolle's Abr. Arb. B. 10, 11, p. 248; Hemsworth v. Brian, 1. C. B. 131.

<sup>5</sup> In re Gillon v. Mersey Navigation Company, 3 Barn. & Ad. 493; and see Hemsworth v. Brian, 1 C. B. 131; Baillie v. Edinburgh Oil Gas Company, 3 Cl. & Fin. 639.

<sup>6</sup> Glover v. Barrie, 1 Salk. 71; and see Spigurnell v. Jene, 1 Sid. 12.



An award ordering two persons to intermarry is in excess of an arbitrator's authority and void; apparently on the ground that it is against public policy to force marriages on any ground other than mutual inclination of the persons.<sup>1</sup>

An award ordering a party to do a criminal act,<sup>2</sup> or an illegal act,<sup>3</sup> or an act which would make him a trespasser,<sup>4</sup> is invalid.<sup>5</sup>

**The Arbitrator cannot go beyond the Precise Question submitted.**

—The general rule is that the power of the arbitrator is limited to the determination of precisely the questions which are submitted.<sup>6</sup> It will not do for him to take into consideration and to determine any claims or demands, though existing between the same persons who are parties to the submission, save only those which they have agreed that he shall decide. It often seems to be so convenient, useful, and reasonable to include and dispose of in the award other outstanding and perhaps cognate controversies, that the temptation to do so will be very strong. But the error, unless the excess be separable, will be fatal to the validity of the whole award; and in every instance the excessive portion will be void. For example, if claims made by A. against B. are submitted, it would be an excess of authority to consider claims of B. against A. An agreement of submission recited that A. had begun an action of trespass against B. and C., also another suit against B., which two actions the parties submitted. The referees awarded that B. and C. should recover from A. a certain sum of money, and that B. should recover from him a cow. The court said that it was manifest that nothing was intended to be submitted except two actions brought by A. No demands of B. and C.

<sup>1</sup> Bac. Abr. Arb., E. 3; Rolle's Abr. Arb., I. 10, p. 252.

<sup>2</sup> Co. Litt. 206; Wood v. Griffith, 1 Swanst. 55; Bac. Abr. Arb., E. 4.

<sup>3</sup> Bac. Abr. Arb., E. 4.

<sup>4</sup> Bac. Abr. Arb., E. 4; Turner v. Swainson, 1 Mee. & W. 572.

<sup>5</sup> Russell on Arb., 8d ed. 391.

<sup>6</sup> Cook v. Carpenter, 34 Vt. 121; Butler v. Mayor, &c., of New York, 7 Hill, 329; Robinson v. Moore, 17 N. H. 479; Hayes v. Forskoll, 31 Maine, 112.

against A. were submitted, unless perhaps a claim for costs in those actions. The arbitrators had exceeded their powers and had made an award not warranted by the submission, which was, therefore, set aside.<sup>1</sup>

G. and C. presented claims against the estate of one B., a deceased person, which it was arranged to submit to three arbitrators, to be appointed by the probate court. The arbitrators awarded that nothing was due to G. and C. from the estate of B., but further found that there was due to said estate from G. and C. a certain sum. Held, that in this last finding, the arbitrators exceeded their authority.<sup>2</sup>

A submission concerning the "earnings and expenses" of a vessel does not authorize the arbitrators to consider sums paid or received by way of insurance, unless there was express power given to the party effecting the insurance to do so; otherwise it is not an "expense." Nor are receipts from it "earnings."<sup>3</sup>

**The Arbitrator cannot modify the Question submitted.**—Of course the arbitrator cannot vary or modify the precise question submitted, and substitute in the place of that matter which the parties wish to have decided some other similar, cognate or collateral point bearing upon the same general subject, or some other form of the same controversy. Thus where a boundary line has once been determined by an award, but has again become a subject of dispute, a submission to a new arbitrator by a proper construction of its language confined him to the task of retracing so nearly as he could the line determined by his predecessor. Held, that his running a new line on the basis of his own judgment as to what was the correct boundary, was an excess of authority which avoided his award.<sup>4</sup>

**The Arbitrator cannot do General Equity.**—So also the arbi-

<sup>1</sup> Worthen v. Stevens, 4 Mass. 448; but see *ante*, the chapter on "Parties."

<sup>2</sup> Gilmore v. Hubbard, 12 Cush. 220.

<sup>3</sup> Sawyer v. Freeman, 35 Maine, 542.

<sup>4</sup> Wyman v. Hammond, 55 Maine, 534.

trator will often be tempted, without actually including, as in the preceding cases, other distinct claims, yet to take the whole subject-matter out of which the controversy grows into his consideration and to seek to do a large and liberal equity concerning the whole of it by making an award of a more extensive character than he would be authorized to do by the strict terms of the submission. But the following adjudications will show that this course, however much it may seem to have to excuse or even to recommend it in any particular case, is a fatal infringement of the rule which requires the authority contained in the submission to be rigidly respected and adhered to.

A submission concerning the claims of A. against B., authorized the arbitrators, if they should find B. indebted to A., to estimate the improved value of chattels of A. in B.'s possession and deduct the valuation from the indebtedness, also to appraise certain property belonging to B. and to be received by A. in part payment. Held, that an award transferring more property from B. to A. than was necessary to discharge the indebtedness and ordering the balance of the value of the property so transferred to be paid by A. to B., was bad, as not following the submission, and exceeding the authority conferred by it. And though the arbitrators were also authorized to consider all demands between the parties, and to "estimate what was just, right, and lawful between them" according to their contract, yet this gave them no authority to compel one party to become a purchaser, since this was not in pursuance of the contract.<sup>1</sup>

Under a submission of "all unsettled accounts," an award dividing between the parties the personal property owned by one of them, and decreeing that each should pay one-half of the indebtedness, which both or either of them owed, was held bad, as being in excess of authority. For the party owning the personalty had not authorized the arbitrators to determine

<sup>1</sup> Culver v. Ashley, 17 Pick. 98.

upon what terms she should dispose of it. Neither did the submission authorize the arbitrators to declare how the debts should be paid ; a matter settled by the law. The referees, it was said, proceeded as if the parties had authorized them to hear and determine what debts they, and each of them, owed, and what part each was to pay. Whereas, it does not appear that there was any dispute between them on that subject.<sup>1</sup>

Certain insured goods were burned up. The owner and the insurance company agreed upon a sum to be paid for the goods enumerated in a certain list, and submitted to arbitration the question what sum should be paid for certain other goods. Held, that the arbitrator had no authority to award that the owner was entitled to salvage on the goods named in the list.<sup>2</sup>

Under a submission of the question whether some fixtures, removed by a landlord, were part of the demised premises, it was held not to be within the arbitrator's power to order the tenant to replace the fixtures, and the landlord to reimburse to him the expense of replacement.<sup>3</sup>

The question submitted was, whether or not the title to certain real estate was good. Held, that the arbitrator's authority did not extend to ordering the purchaser to take the title, with all its faults, and the seller to execute a bond indemnifying him against eviction.<sup>4</sup>

**Orders concerning Price and Payment.** — Generally, if the arbitrator awards that one party shall pay the other a certain sum, he may order at what time and place payment shall be made.<sup>5</sup>

If, however, the duty of the arbitrator is merely to fix the price to be paid for certain property, it is in excess of his

<sup>1</sup> *Shearer v. Handy*, 22 Pick. 417.

<sup>2</sup> *Skipper v. Grant*, 10 C. B. 237.

<sup>3</sup> *Price v. Popkin*, 10 Ad. & El. 139.

<sup>4</sup> *Ross v. Boards*, 8 Ad. & El. 290.

<sup>5</sup> *In re Morphett*, 2 Dowl. & Low. 967 ; *Freeman v. Bernard*, 1 Salk. 69 ; *Anon.* 1 Keb. 92, 2 Brownl. 309 ; *Armitage v. Walker*, 2 Kay & J. 211.

power, in addition to settling the price, to order that the payment shall be made on a future day named by him.<sup>1</sup> And Russell says it is "very questionable" whether, when a verdict is to be taken for an amount to be determined by a reference, the referee may set the day or place for payment of the sum for which he orders a verdict to be entered.<sup>2</sup>

Where the duty of the arbitrator is not so closely restricted to the mere statement of a sum of money, but he has a general power to order a payment to be made, it is within the scope of his authority to direct that the payment be made in the shape of a promissory note, payable on a future day named, to be given by the losing to the gaining party.<sup>3</sup> Also, he may order the debtor to give a bond to the creditor, conditioned for the payment of the sum awarded on a future day certain.<sup>4</sup> He may award payment by instalments,<sup>5</sup> with the further proviso that, on failure to pay any instalment, the whole amount shall at once come due.<sup>6</sup>

But an authority to fix upon a sum to be paid, does not include authority to order the payment to be in something else than money. Where it was agreed that a confessed judgment should be released on payment of such sum as A. should find to be due, it was held that A. had not power to order that the payment should be made in certain property at an appraised value.<sup>7</sup>

**Orders concerning Allowance of Interest.**—In England the courts have permitted the arbitrator to exercise a liberal power concerning the allowance of interest. The propriety of

<sup>1</sup> *Emery v. Wase*, 8 Ves. Jr. 504, *u.*

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 392; *Rees v. Waters*, 16 Mee. & W. 263; 4 Dowl. & Low. 567.

<sup>3</sup> *Booth v. Garnett*, 2 Strange, 1082.

<sup>4</sup> *Cook v. Whorwood*, 2 Saund. 337; 2 Lev. 6; *Brown v. Watson*, 6 Bing. N. C. 118.

<sup>5</sup> *Kockill v. Witherell*, 2 Keb. 838.

<sup>6</sup> *Royston v. Rydall*, Rolle Abr. Arb., H. 8, p. 250; Com. Dig. Arb. E. 15; *Kockill v. Witherell*, 2 Keb. 838.

<sup>7</sup> *State v. Jones*, 2 Gill, 49.

such allowance is regarded as a question falling within his discretion, and therefore his finding will be treated as final.<sup>1</sup> It has been so held where he gave compound interest.<sup>2</sup> He may also compute interest upon accounts under circumstances where the courts of law would not do so ; at least, provided he thereby violates only a regulation of practice and not any general rule of law.<sup>3</sup>

**The Arbitrator's Power in Disputes between Partners.** — Differences between partners constitute a very common subject-matter of submission, and many nice questions have arisen out of such arbitrations, especially in England.

An arbitrator to whom all matters in difference between partners are submitted, can award a dissolution of the partnership, provided the question, whether or not they shall dissolve, is in issue between the parties.<sup>4</sup> But where he was authorized "to arbitrate and determine as well a dissolution . . . and the cancelling the indenture of a copartnership, as of and concerning all matters in difference between the parties," it was held that he was under no positive obligation to order a dissolution.<sup>5</sup>

A bill in equity was filed against a partner by his copartners, praying a dissolution and settlement of accounts. The cause was referred to a master to take and state an account between the parties to the cause. Afterward, by agreement of parties and order of court, "this cause and all mutual claims and demands between the plaintiff and defendant in any way resulting from the transactions of said copartnership," &c., were referred. The award only directed one partner to pay a sum of money to the other partners, leaving the partnership account still open. Held, that the report, in this

<sup>1</sup> *Sherry v. Oke*, 3 Dowl. 349 ; *Beahorn v. Wolfe*, 1 Alcock & Nap. (Irish R.) 233 ; *Armitage v. Walker*, 2 Kay & J. 211.

<sup>2</sup> *Morgan v. Mather*, 2 Ves. Jr. 15 ; *In re Morphet*, 3 Dowl. & Low. 967.

<sup>3</sup> *In re Badger*, 2 Barn. & Ald. 691.

<sup>4</sup> *Green v. Waring*, 1 Wm. Bl. 474.

<sup>5</sup> *Simmonds v. Swaine*, 1 Taunt. 548.

shape, was not final, and could not be accepted without directing a decree that the partnership should be dissolved. The arbitrator was empowered to do both what a master would find and what the court should decree, as a final settlement of the partnership account between each partner and the firm, and thus ascertain what is due to it from each. For this purpose it was necessary to close the concern, to provide for the collection of all dues, and for the payment of all debts, and to distribute between the parties any surplus there might be. Accordingly, the case and report were re-committed to the arbitrator to take the account and complete the settlement upon the grounds indicated.<sup>1</sup>

Russell says that "a wide discretion is given to the arbitrator where he is to settle the terms on which a partnership is to be dissolved;"<sup>2</sup> and illustrates his statement by the following cases: An arbitrator was to determine the terms upon which a partnership between two attorneys should be dissolved, and also which of them should have the right to collect certain bills of costs. He awarded to one this right to collect the costs and to keep them as his own, and also awarded that this one should be entitled to use the name of the other either alone or jointly with his own in suing for these costs. The award was upheld as being within the authority of the arbitrator. The power to give such a right of action was regarded as implied in the duty to decide which of the two should collect the costs, and also in the power to settle the terms of dissolution; nor was it considered a sufficient objection that, though the attorney whose name should be used by the other in actions, might be thereby rendered liable for costs in those actions, no indemnity was provided for him.<sup>3</sup>

A submission between two persons carrying on business as surgeons and apothecaries in a town, left to the arbitrator to

<sup>1</sup> *Paine v. Paine*, 15 Gray, 299.

<sup>2</sup> *Russell on Arb.*, 8d ed. p. 399.

<sup>3</sup> *Benton v. Wigley*, 1 Bing. N. C. 665.

determine the terms of dissolution, and provided that one of them should continue to conduct the business for his own sole benefit. An order in the award, that it should not be lawful for the other to carry on the same business in the said town, or within thirteen miles of it, was upheld, as being within the authority of the arbitrator.<sup>1</sup>

Copartners agreed orally to submit all differences arising out of the partnership, and especially the several claims of the partners against the firm, or against each other, growing out of the partnership, and the several demands of the firm against the partners severally, to the end that there might be a final settlement thereof. After determining the indebtedness of the partners, one to another, the arbitrators proceeded to declare how any future receipts on firm account should be divided, and how debts should be paid; conforming in these directions to the provisions in the articles of copartnership. The court was "strongly inclined to the opinion" that the arbitrators did not exceed their authority in this latter portion of their award.<sup>2</sup>

Two partners entered into an agreement of submission, "with a view to make provision for a full and perfect settlement of all things which are now, or may hereafter be, between them," empowering the arbitrators "to arbitrate, award, order, and determine of and concerning all manner of actions, causes of actions, suits, bills, bonds, controversies, and demands of every nature," and stipulating "to abide by and perform the award of said arbitrators, and to execute such releases, discharges, and conveyances, and any other papers deemed by said arbitrators proper to be executed, to carry into full effect their award." The arbitrators ordered one partner to execute to the other a deed, with release of dower by his wife, of a certain lot owned by the partners as tenants in common, also a release and assignment of all personal property and assets of

<sup>1</sup> *Morley v. Newman*, 5 Dowl. & Ry. 317.

<sup>2</sup> *Barrows v. Capen*, 11 Cush. 37.



the firm. The recipient was ordered to execute in return an indemnity to the conveying partner against all claims of every name and nature outstanding against the firm, or the partners jointly, or jointly and severally. The court said the arbitrators had full power to adjust the matter in dispute, relative to the partnership, in such manner as should seem to them just ; and the award was upheld as within the scope of their authority, in every respect, save only as to an item of time immaterial in this connection. And, upon a further argument of the same cause, the objection that the joint and several notes were not embraced in the submission, was scouted by the court.<sup>1</sup>

The arbitrator should determine the claims and demands of each party to the submission against each of the others, and should state the amount which each is to receive from any other, or to pay to any other, on the footing of such account.<sup>2</sup>

The arbitrator of course has no power over the creditors or debtors of the firm. He may order one partner to pay all the debts, or he may order the partners to pay the debts in certain proportions respectively, as between themselves ; he may order that such sums as shall be paid in shall be distributed among the partners in a certain ratio. Such orders may create rights and demands in favor of one partner against another, which will be valid and enforceable at law. But the right of a creditor to hold each and every partner liable *in solido*, or the right of a debtor to discharge his indebtedness by a payment to any one of the partners, are matters which obviously cannot be affected by an award made under a submission to which neither such creditor nor such debtor is a party.<sup>3</sup>

In winding up the affairs of a partnership, if there be any dispute as to amounts, the arbitrators should take an account

<sup>1</sup> Richardson v. Huggins, 23 N. H. 106.

<sup>2</sup> Aitken's Arbitration, 3 Jur. n. s. 1296.

<sup>3</sup> Wood v. Wilson, 2 Cr. Mee. & Ros. 241 ; Lingood v. Eade, 2 Atk. 501 ; Lamphire v. Cowan, 39 Vt. 420.

of the debts and credits of the firm ; and if they add a list of debtors and creditors with the amount of their respective debts or credits set against their names, these lists will be presumed to be full and correct until the contrary is proved to be the fact.<sup>1</sup>

But if there be no dispute such a finding is unnecessary ; and in the absence of such a finding the presumption is that there was no such dispute. Therefore, an order that the partners shall contribute equally to the payment of the debts and shall share the assets equally, is sufficient, though the amount of debts or assets is not stated.<sup>2</sup>

Where the submission recites, in terms, that there are disputes touching the division of partnership property, gives the arbitrator power to divide it between the parties, and contains interchangeable stipulations that each party will convey to the other according to such division, it would seem that it is the duty of the arbitrator to make a division, and that awarding the whole to one partner at a price to be paid by him to the other would be unsatisfactory. Yet in a case where an arbitrator had made an award of this latter character the court held it to be good on its face ; not however as being *per se* correct, but upon the presumption, to be entertained till the contrary should be shown, that the parties had made some arrangement before the arbitrator, whereby one of the parties was ultimately to become possessor of the whole property.<sup>3</sup>

But a power to divide partnership assets is by no means always to be inferred as incidental to a submission of disputes between partners, as is shown by the following case.

A submission was made by partners of all demands between them, whether arising out of their business as partners or out of any other transactions. It was held that an effort to divide or otherwise dispose of the partnership property or credits, or

<sup>1</sup> Lingood v. Eade, 2 Atk. 501.

<sup>2</sup> Wood v. Wilson, 2 Cr. Mee. & Ros. 241.

<sup>3</sup> Wood v. Wilson, 2 Cr. Mee. & Ros. 241 ; Russell on Arb., 3d ed. p. 399.

to determine how the debts owing by the firm should be paid, was an excess of authority.<sup>1</sup>

Nor when it might be gathered from the submission that the power to make division is conferred, does it therefore follow that it must be exercised. Under an agreement "to submit all demands of every name and description, whether arising out of their business as partners under the firm of B. & F. or out of any other transactions between them" the arbitrators stated in their award that they had not taken into consideration the stock, tools, and other property of the firm, nor the debts owing to it nor due from, but that they left all these to be thereafter adjusted and divided between the partners. Held that though disputes concerning these matters might have been in existence at the date of the submission which should therefore have been determined, yet since this fact did not appear the contrary would be presumed. That disputes might afterwards naturally spring out of these same sources was immaterial. The award was upheld.<sup>2</sup>

If the award directs a distribution of surplus assets and is silent as to the contingency of the assets being insufficient to meet the liabilities, it is not necessarily invalid. The court will presume, till the contrary is shown, that the arbitrators were correct in their supposition as to the sufficiency of assets.<sup>3</sup>

An arbitrator has no power to appoint a receiver of the firm assets, unless he be specifically authorized by the submission so to do.<sup>4</sup> If he has such authority and exercises it, it is proper, though not necessary, that he should order the partners to give a power of attorney to the person named as receiver to collect debts, &c.<sup>5</sup> It has also been said that care should be taken in the submission to exonerate the arbitrator from any

Hayes v. Forskoll, 31 Maine, 112.

<sup>2</sup> Ibid.

<sup>3</sup> Wilkinson v. Page, 1 Hare, 276 ; Routh v. Peach, 3 Anst. 637.

<sup>4</sup> Lamphire v. Cowan, 39 Vt. 420 ; *In re Mackay*, 2 Ad. & El. 356.

<sup>5</sup> Lingood v. Eade, 2 Atk. 501.

liability growing out of the application of the moneys collected by the receiver; since otherwise, if the receiver become insolvent, it is doubtful whether the arbitrator might not under some circumstances be held personally liable.<sup>1</sup>

**Power of Arbitrator to order Execution of a Release.**—It may be laid down as a general rule that arbitrators have power to order a party to the submission to execute a release to another party to the submission of or concerning any claim or demand constituting a portion of the subject-matter thereof.

Under a general submission of all matters in difference, mutual general releases may be ordered to be executed.<sup>2</sup> Where "all debts, sums of money and demands" are submitted, a release may be awarded to be executed of any bonds, specialties, judgments, executions, &c., under and by virtue of which the debts, &c., are due.<sup>3</sup> But a release of the arbitration bond itself cannot be ordered.<sup>4</sup>

Of course if the submission be of a specific matter an award of general releases will be an excess of authority.<sup>5</sup> But the intendments and presumptions of the law always come to aid the validity of the award by cutting down an order for releases of an apparently general nature, to an order commensurate with the arbitrator's authority, provided that such a construction be possible.<sup>6</sup> This rule is carried so far that even where such a construction is impossible the award may still be upheld. For example, where the authority of the arbitrator would allow him to order a release only of such claims as exist up to a certain date, and he awards a release of claims existing up to a later date, the court will presume, until the contrary is shown, that no new claim

<sup>1</sup> *Lingood v. Eade*, 2 Atk. 501. But see *Anon.* 12 Mod. 560.

<sup>2</sup> *Cable v. Rogers*, 3 Bulst. 311.

<sup>3</sup> *Roberts v. Marriett*, 2 Saund. 190.

<sup>4</sup> *Doyley v. Burton*, 1 Ld. Raym. 533.

<sup>5</sup> *Doe d. Williams v. Richardson*, 8 Taunt. 677.

<sup>6</sup> *Russell on Arb.*, 3d ed. p. 403; *Doe d. Williams v. Richardson*, 8 Taunt. 697; *Barry v. Rush*, 1 Term, 691; *Boyes v. Bluck*, 13 C. B. 652; *Marks v. Marriot*, 1 Ld. Raym. 114.

arose in the interval. And even if the fact that such new claim did arise be actually shown, the award will in general be bad only as to this interval, and this bad portion may be rejected as surplusage. So if the award in an arbitration concerning particular matters calls for a general release, the courts will compel a release concerning the particular matters and will reject the rest of the order.<sup>1</sup>

An award that a sum be paid at a day future, and that a release be given before that day, is bad; since such a release might avoid the arbitration bond and take away the right to collect the sum by legal process.<sup>2</sup>

An award directed A. & B. to execute "forthwith" certain conveyances to C., and ordered C. "forthwith" to execute indemnities and releases to A. & B. This award was construed to require C. to give the indemnities and releases immediately upon receiving the conveyances from A. & B., and was upheld as good.<sup>3</sup>

As a general rule, it is said that the award need not designate the form of the releases, neither the time at which they are to be executed.<sup>4</sup>

**Power to order Conveyance of Real Estate.**—If disputes concerning the title to or boundaries of real estate are properly presented to and determined by arbitrators, they have power to direct in their award that such deeds of conveyance shall be executed and delivered by either party to the other, as may be necessary to give effect to their decision.<sup>5</sup> The

<sup>1</sup> Russell on Arb., 3d ed. pp. 313, 314, 403; Bac. Abr. Arb. E. 1; Hill v. Thorn, 2 Mod. 309; Squire v. Grevett, 2 Ld. Raym. 961; Lee v. Elkins, 12 Mod. 585; Anon. ib. 8; Hooper v. Pierce, ib. 116; Abrahath v. Brandon, 10 id. 201; Pickering v. Watson, 2 W. Bl. 1118; Stevens v. Matthews, 1 Ld. Raym. 116.

<sup>2</sup> Adams v. Adams, 2 Mod. 169.

<sup>3</sup> Boyes v. Bluck, 13 C. B. 652. And to the same general effect is Inhabitants of Portland v. Brown, 43 Maine, 223, and McNeil v. Magee, 5 Mason, 244, to be discussed hereafter.

<sup>4</sup> Russell on Arb., 3d ed. p. 404; Toby v. Lovibond, 17 L. J. C. P. 201; 5 C. B. 770.

<sup>5</sup> Penniman v. Rodman, 13 Metc. (Mass.) 382; Williams v. Warren, 21 Ill. 541; Johnson v. Wilson, Willes, 248; Russell on Arb., 3d ed. p. 404.

power is an inherent one, and resides in the arbitrator by virtue of the nature of the controversy which he has to determine, without any authorization in terms in the submission.<sup>1</sup> Indeed it is obvious that without it the object of the submission could often not be attained; and its exercise is rendered indispensable by reason of the rule, that an award finding that the title to real estate is in a certain person, whether he be a party to the submission or not, does not vest the title in him without the formality of a conveyance from the person in whom the nominal title is outstanding.<sup>2</sup> But a power to determine a disputed title is not equivalent to or inclusive of a power to change or transfer title. If the controversy be, who is the owner, the duty of the arbitrator is confined to deciding this precise fact, and ordering any conveyance necessary to vest a complete title in the party in whose favor he finds.

A demand for certain buildings and land was submitted. It was held that the arbitrators might award the buildings and land, either in whole or a certain specified part thereof, to one party; or the land to one party and the buildings to the other; according as they should find the title actually to be. But they had no authority to award that one should take the whole land and buildings and should pay to the other a certain sum, whereby, in fact, they would arrange a purchase and sale of the property.<sup>3</sup>

**Specifications concerning the Legal Form, &c., of the Conveyance.**—If the arbitrator orders a conveyance to be made, it has been said, in England, that he should specify the nature and character of the instrument.<sup>4</sup> But it seems, that any ordinary phraseology will suffice, provided its meaning be

<sup>1</sup> *Penniman v. Rodman*, 13 Metc. (Mass.) 382.

<sup>2</sup> *Loring v. Whittemore*, 13 Gray, 228.

<sup>3</sup> *Robinson v. Moore*, 17 N. H. 479.

<sup>4</sup> *Tandy v. Tandy*, 9 Dowl. 1044; *Tipping v. Smith*, 2 Strange, 1024; *Thinne v. Rigby*, Cro. Jac. 314; *Smalley v. Blackburn Railway Company*, 2 Hurl. & Nor. 158; 27 L. J. Exch. 65.

reasonably clear. Thus an order that a deed of assignment, a mortgage deed, and a release of all right, title, and interest in certain premises be severally executed, is sufficient, without the actual drafting of these instruments, or minute setting forth of their contents by the arbitrator himself.<sup>1</sup>

In Massachusetts specific performance was compelled upon an award ordering a conveyance to be made "to the said P., his heirs and assigns for ever, by a good and sufficient deed of warranty, free and discharged from all incumbrances"; also ordering that one party should "execute a good and sufficient deed of release to the said P., his heirs and assigns for ever, of all the right, title, interest, and estate" of the grantor, in certain real estate. The question as to the sufficiency of the description of the legal instruments was apparently not raised, even by the defendant's counsel in argument. It was taken for granted by all concerned as well as by the court.<sup>2</sup>

An award ordered a party "to make and well execute a good authentic deed of conveyance." It was held that it would be sufficiently complied with by the execution of such a deed as was valid and sufficient in point of law to pass the title to the estate. The real point of the ruling, however, lay in the decision that these words could not be made to refer to the title conveyed, and the remark as to the description of deed which would be a fulfilment of the requirement was only *obiter dictum*.<sup>3</sup>

Russell says that the arbitrator is recommended to state in his award by which party and at the charge of which party the conveyance shall be drawn.\* But this direction does not appear to be indispensable.<sup>5</sup>

<sup>1</sup> Tebbutt v. Ambler, 2 Dowl. N. S. 677.

<sup>2</sup> Penniman v. Rodman, 13 Metc. (Mass.) 382. See also Jones v. Boston Mill Corporation, 4 Pick. 507; McNeil v. Magee, 5 Mason, 244.

<sup>3</sup> Preston v. Whitcomb, 11 Vt. 47. And see Kyle v. Kavanagh, 103 Mass. 356.

<sup>4</sup> Russell on Arb., 3d ed. p. 405; Standley v. Hemmington, 6 Taunt. 561; Doe d. Clarke v. Stilwell, 8 Ad. & El. 645.

<sup>5</sup> In Penniman v. Rodman, 13 Metc. (Mass.) 382, no such direction was made, but specific performance was compelled without reference to this as a defect.

**When Conveyance need not be ordered.** — It seems that it may be fairly gathered from a Massachusetts case that if the owners of adjoining lots submit a dispute concerning their boundary line, and in their bond bind themselves "to give deeds according to the award of the referees," it will not be necessary for the award itself to contain an order for the execution of a conveyance by the losing party. If the boundary line be run, his obligation to give such a deed, if any, as is necessary to establish that boundary line, is complete without the arbitrator's order.<sup>1</sup>

**Power of Arbitrator in Cases of Land Damages.** — Under statutes providing that where land is taken for a highway, and the selectmen and owner are unable to agree on the price or damages, there may be an arbitration, the arbitrators can consider only such matters as could properly be considered by the selectmen. The precise duty which was first imposed upon the selectmen is shifted upon the arbitrators. If they go beyond the strict determination of damages caused by the taking of the land; as, for example, if they award also for injury done to the owner by the discontinuance of an old road or for the cost of cutting a new cross-road through his own premises to reach the new highway, they exceed their powers, and their award is, at least *pro tanto*, void. The value of the land taken, the expense of fencing against the new road, and the damage done to the land remaining, are the sole matters which can be taken into consideration.<sup>2</sup>

**Power to go behind a Receipt in full.** — In the following case it was held not only that the arbitrators might go behind a receipt in full given by one party to the other, but even that it might be their duty to do so. A submission was of all matters arising out of the trade and dealings of the parties, and stipulated that the award should be in full settlement and discharge

<sup>1</sup> Caldwell v. Dickinson, 13 Gray, 365.

<sup>2</sup> Dalrymple v. Town of Whitingham, 26 Vt. 345. And see Commonwealth v. Justices, &c., of Norfolk, 5 Mass. 435; Livermore v. Jamaica, 23 Vt. 363.



from one to the other concerning and in respect to their said trade and dealings, from the commencement thereof to the date of the submission. The court said that there was no doubt that this language was sufficiently comprehensive to authorize the arbitrators to go behind the receipt and look into the settlement which led to it, and the results of which it represented. The submission set no limit of time to their investigation. Neither was the receipt conclusive between the parties. It might have been given by mistake, or as the consequence of fraud; and all such matters would be open to the arbitrators. Indeed the court even went so far as to add that if the arbitrators had refused to go behind the receipt and look into the settlement, at the request of either of the parties, it would have afforded a much stronger reason for setting aside the award than the objection now taken by the defendant.<sup>1</sup>

**Orders concerning Incidental Matters.** — Such matters as are necessarily or properly incidental to or comprised within the precise question submitted may be disposed of by the arbitrator. And such directions as are reasonably necessary or conducive towards the completion of such an award in the premises as it is within his authority to make can be given by him, and will be valid.<sup>2</sup>

But it seems that this power is closely limited. The precise function or duty which the arbitrator is called upon to fulfil constitutes the limit of his authority. He cannot go beyond the task allotted to him; though he may provide necessary means for carrying out his award, he cannot order things not absolutely necessary but only convenient to be done. In a cause there had been confession of judgment, to be released on payment of such sum as A. should find to be due. Held, A.

<sup>1</sup> *Maynard v. Frederick*, 7 Cush. 247.

<sup>2</sup> *Boston Water Power Company v. Gray*, 6 Metc. (Mass.) 131; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Atkins v. Baldwin*, 1 Stark. 209; *Beckingham v. Hunter*, Rolle's Abr. Arb. D. 8, p. 246; *Harrison v. Lay*, 13 C. B. n. s. 528. And see *Russell on Arb.*, 3d ed. pp. 389, 390, where brief statements of these cited cases are given.

could only designate the amount due ; he could not order the judgment to be released.<sup>1</sup>

**Power and Duty to order what shall be done by a Party in the Future.** — An authority in the arbitrator to order what shall be done by the parties, or either of them, in the future, in respect to the subject-matter of the submission, is derived only from a power to that effect expressly or impliedly given him by the submission. Power of this kind is often given where the dispute concerns an easement or the use of a water-power, and disputes of a similar nature, wherein the future enjoyment of the property or regulation of the right ought to be disposed of if it is desired to achieve a final settlement of the controversy.

The question which it is most difficult to answer in relation to the delegation of an authority of this kind is, whether or not it is permissive or compulsory. If it be permissive only, then it is in the discretion of the arbitrator to act under it or not, as he sees fit. If it is compulsory, he is under an obligation to act under it ; and if he fails to do so, the defect may avoid his award. The language and subject-matter of the submission will of course give the one or the other character in each particular case.

Giving the arbitrator "power to determine what he shall think fit to be done by the parties respecting the matters in dispute" is considered to give a discretionary power to the arbitrator, under which he may either give or refrain from giving orders, as he may see fit.<sup>2</sup>

Power to direct "what, if any thing, shall be done" is, of course, permissive only.<sup>3</sup>

Words grammatically permissive are sometimes construed to be imperative by reason of the intrinsic fitness or necessity

<sup>1</sup> *State v. Jones*, 2 Gill, 49.

<sup>2</sup> *Angus v. Redford*, 2 Dowl. N. s. 735 ; 11 Mee. & W. 69 ; *Morgan v. Smith*, 1 Dowl. N. s. 617 ; 9 Mee. & W. 427.

<sup>3</sup> *Nicholls v. Jones*, 6 Exch. 373.

of such a construction, arising out of the subject-matter or circumstances of the submission.<sup>1</sup>

In the Court of Exchequer it has been held that if the clause conferring the power be permissive only, and the arbitrator acts under it, but in this portion of his award commits some error, nevertheless the whole award need not be set aside.<sup>2</sup> But the Court of Queen's Bench has held otherwise, except in the case where the error is a mere excess of authority and separable, in which case it may be rejected under the doctrine of divisibility in the award.<sup>3</sup>

**Validity of Orders concerning Future Conduct of a Party.**—The matter of whether or not the directions as to what shall be done are valid or invalid depends in each case upon the language of the submission and character of the subject-matter and the circumstances. Mr. Russell has given brief statements of the various English decisions in cases of this kind, which, however, do not seem likely to prove of sufficient value as precedents, by analogy, to be transferred at length to these pages. They are cited below.<sup>4</sup>

Where the dispute concerns the use of water-power the temptation to provide for future use is often great, since the mere award of damages for past misuse seems to leave the controversy in a very unsatisfactory condition. But the nature of

<sup>1</sup> *Crump v. Adney*, 1 Cr. & Mee. 355; 3 Tyrw. 270; *Ross v. Clifton*, 9 Dowl. 356. But see *Grenfell v. Edgcome*, 7 Q. B. 661.

<sup>2</sup> *Nicholls v. Jones*, 6 Exch. 373.

<sup>3</sup> *Stonehewer v. Farrar*, 6 Q. B. 730.

<sup>4</sup> In the following cases the directions were held valid: *Taylor v. Shuttleworth*, 8 Dowl. 281; *Prosser v. Goringe*, 3 Taunt. 425; *Boodle v. Davies*, 3 Ad. & El. 200; *Winter v. Lethbridge*, 13 Price, 533; *Walker v. Frobisher*, 6 Ves. Jr. 70; *Round v. Hatton*, 10 Mee. & W. 660; *Miller v. De Burgh*, 4 Exch. 809; *Mays v. Cannell*, 24 L. J. C. P. 41; *Eastern Union Railway Company v. Eastern Counties Railway Company*, 2 El. & Bl. 530. In the following cases the directions were held invalid: *Hayward v. Phillips*, 6 Ad. & El. 119; *Prentice v. Reed*, 1 Taunt. 151; *Hooper v. Hooper*, M'Lel. & Y. 509; *Johnson v. Latham*, 19 L. J. Q. B. 329; *Price v. Popkin*, 10 Ad. & El. 139; *Stonehewer v. Farrar*, 9 Jur. 203; 6 Q. B. 730; *Sharpe v. Hancock*, 7 Man. & Gr. 354. And see Russell on Arb., 3d ed. pp. 408-415

the subject-matter does not increase the actually conferred authority, and regulations concerning future use will be void unless the arbitrators have been specifically empowered to make them.<sup>1</sup>

In a dispute concerning a lease of a water-power, it appeared that the lessee claimed that he had not had his due quantity, and the lessors claimed that he had had more than such quantity. The arbitrators were expressly empowered to regulate the future enjoyment of the rights of the parties. They ordered a measuring apparatus, or gauge, to be set up and thereafter maintained at the lessee's mills, to measure the amount of water which should be used, and that a portion of the expense of setting up and maintaining should be borne by him. The court upheld the validity of this direction. Chief Justice Shaw said, that "when power is given to provide for the accomplishment of a certain end, it carries with it, by reasonable implication, the power to direct the means by which it shall be done; being judged to be suitable and proper." Here the arbitrators evidently thought that only by means of the maintenance of this gauge could an effectual regulation of the future enjoyment by the parties of their respective rights be secured. "Under an authority to direct how, in future, water and water-power should be measured, with a view to its future enjoyment, they had power to direct that a proper apparatus should be erected and maintained, and, as incident thereto, to direct how the expense of erecting and maintaining it should be apportioned."<sup>2</sup>

In an action on the case for nuisance, a submission was made to arbitrators to determine "whether the defendant's dam shall be cut down wholly or in part, and fix the height at which it shall be maintained, if it may be maintained at all, and whatever they decide shall be done under their direction." The award gave damages and fixed the height at which the

<sup>1</sup> *Boynton v. Frye*, 33 Maine, 216.

<sup>2</sup> *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.) 131.

dam might be maintained. The plaintiffs moved for judgment for the damages, and that the part of the dam above the height determined be abated, under the statute concerning the abatement of nuisances. The award was accepted, and it was ordered that a warrant should issue for the abatement of that part of the dam which, being above the height named by the arbitrators, constituted a nuisance.<sup>1</sup>

The conclusive character of orders concerning future conduct or acts of the parties, where they have empowered the arbitrator to make such orders, is shown by the following case. A bond was executed by administrators of an estate to the heirs at law, conditioned to abide the award of an arbitrator, who was to determine all differences respecting the settlement of the estate, to award when and in what manner the administrators should settle their final account in the Probate Court, and what items of debit or credit should constitute such final account. The award directed that the account should contain the items of debit and credit specified in the award, stated in the usual form of administrators' accounts. The administrators presented an account conforming to the award in every particular save in the addition of one item not named in the award. In an action of debt on the bond, it was held that these facts showed a breach of the condition of the bond. The administrators bound themselves absolutely concerning their future action, and were liable for failing to make it conform to the award. The fact that the item added was a charge for services done after the award was made was immaterial. The administrators, by their unreserved submission, cut themselves off from the right of preferring such subsequent claim.<sup>2</sup>

**Orders concerning Future Acts will be sustained, if possible. —** The court will entertain any justifiable presumption in order to sustain the directions as to future acts given in the award.

<sup>1</sup> *Berkshire Woollen Co. v. Day*, 12 Cush. 128.

<sup>2</sup> *Stratton v. Mason*, 15 Pick. 508.

If any state of facts would render these directions valid and proper, the existence of that state of facts will be presumed, unless the contrary is shown, or the party on whom the burden of the orders rests has been misled.<sup>1</sup>

If objections to the directions embodied in the award resolve themselves into questions on the merits, or go to the justice or propriety of the arbitrator's decision concerning the facts, they will not be considered by the courts.<sup>2</sup>

**Limitation of Authority as to Time Past.** — If there be limits of time within which only the arbitrators are empowered to inquire or to establish rules or regulations, they cannot exceed them. The power to determine what shall be done in the future does not carry with it any authority as to the like matters in the past. Thus where commissioners are appointed to settle the terms upon which connecting railroad corporations shall carry passengers and freight for each other, they cannot make any award which shall relate back to a time prior to the petition for their appointment under the statute.<sup>3</sup> In the cited case the commissioners did in fact exceed their authority by determining that their award should relate back to a date anterior to that of the filing of the petition. But the whole award was not therefore held void. So much of it as related to the rights, duties, and obligations of the parties prior to the filing was "set aside and rejected," and the remainder was "accepted, affirmed, and established."

**Orders concerning the Persons or Property of Strangers.** — Arbitrators have, of course, no authority over persons, or over the property of persons, who are strangers to the submission. Orders concerning such persons or concerning their property must therefore in most cases be void.

An order that one party shall do any act, though it be a beneficial one, as the payment of money to a stranger, will

<sup>1</sup> Russell on Arb., 3d ed. p. 409; *Mays v. Cannell*, 24 L. J. C. P. 41.

<sup>2</sup> Russell on Arb., 3d ed. p. 408; *Winter v. Lethbridge*, 13 Price, 533.

<sup>3</sup> *Boston & Worcester Railroad Co. v. Western Railroad Co.*, 14 Gray, 253.

generally be void, and may often avoid the award.<sup>1</sup> Though if this order can be eliminated from the award without prejudice to the parties to the submission, the court will often separate it and maintain the rest of the award.<sup>2</sup>

But if the thing directed to be done to the stranger be beneficial to that party to the submission who is entitled to receive satisfaction, the order and award may be good.<sup>3</sup>

Whether or not the fact of advantage to the party will be presumed, or whether it should appear upon the face of the award, was a matter left in some degree of doubt by the old case of *Bird v. Bird*.<sup>4</sup> It has since been decided that it should appear.<sup>5</sup>

An order that payment be made to a stranger for the use of a party may be good, though the stranger has no actual authority from the party to receive money on his account.<sup>6</sup> In a partnership dispute an order that money be paid to an agent of the partners in trust for them, both partners, and for the benefit of the partnership, was held good.<sup>7</sup> So, also, an order that money be paid either to a party or to A., his attorney, was upheld as convenient and right.<sup>8</sup>

**Order that an Act be done by a Stranger.**—An order that an act be done by a person who is a stranger to the submission, is, of course, generally void.<sup>9</sup> Though an exception

<sup>1</sup> *Dale v. Mottram*, 2 Barn. 291; *Russell on Arb.*, 3d ed. p. 418.

<sup>2</sup> *Bretton v. Prat*, Cro. Eliz. 758; *Pope v. Brett*, 2 Saund. 292; *Samon's Case*, 5 Rep. 77, b; *Samon v. Pit*, Rolle's Abr. Arb. B. 7, p. 248; *Busfield v. Busfield*, Cro. Jac. 577. And see *Rous v. Lun*, 1 Keb. 569; *Alsop v. Senior*, 2 Keb. 707, 718; *Anon.* 1 Leon. 316; *Russell on Arb.*, 3d ed. p. 419.

<sup>3</sup> *Russell on Arb.*, 3d ed. pp. 419, 420, citing *Dudley v. Mallery*, 3 Leon. 62; *Norwich v. Norwich*, ib. 62; *Bedam v. Clarkson*, 1 Ld. Raym. 123; *Wood v. Thompson*, Rolle's Abr. Arb. F. 11, p. 249; *Gray v. Gray*, Rolle's Abr. Arb. E. 6, p. 247; *In re Skeete*, 7 Dowl. 618.

<sup>4</sup> 1 Salk. 74.

<sup>5</sup> *Laing v. Todd*, 13 C. B. 276.

<sup>6</sup> *Snook v. Hellyer*, 2 Chitt. 43.

<sup>7</sup> *Dale v. Motham*, 2 Barnard, 291.

<sup>8</sup> *Hare v. Fleay*, 11 C. B. 472.

<sup>9</sup> *Russell on Arb.*, 3d ed. pp. 421, 422, citing *Bac. Abr. Arb.*, E. 4; *Rolle's Abr. Arb. F. 2*, p. 248; *Mudy v. Osam*, Litt. 30; *Cooke v. Wherwood*, 2 Saund.

has been allowed where the losing party to the submission has power by proceedings in law or equity to compel performance of the act by the stranger. It will then be his duty to exercise such compulsion and procure the performance.<sup>1</sup>

As has been already seen in the chapter on Parties, a party to a submission may stipulate and agree that certain acts, if ordered by the award, shall be done by a stranger. In such case the award may impose orders upon the stranger; for, though the stranger cannot be compelled to perform them, yet, if he refuse to do so, the party who has bound himself for such performance will be liable for a breach of the award.<sup>2</sup>

**Other Non-enforceable Orders.**—Where arbitrators award that a certain thing shall be done by a certain person, but by reason of lack of power in them to make such an order it is void, it follows that the award itself will be void, either in whole or in such of its parts as are dependent upon or connected with this order, or based upon it as a consideration. Thus, where a party to the submission was ordered to procure a release of their rights in certain real estate, to be executed by persons who were strangers to the submission, this order was held void. For though the persons were tenants of the party against whom the order ran, yet he had no apparent means of compelling them to do the act specified.<sup>3</sup> The ruling seems to

377; *Norwich v. Norwich*, 3 Leon. 62; *Thursby v. Helbert*, Carth. 159; 1 Show. 82; *Moore v. Bedel*, Rolle's Abr. Arb. B. 5, p. 247; *Pits v. Wardal*, Godb. 164; *Barney v. Fairchild*, Rolle's Abr. Arb. E. 10, p. 248; N. 9, p. 259; *Lee v. Elkins*, 12 Mod. 585; *Proudfoot v. Poile*, 3 Dowl. & Low. 524.

<sup>1</sup> Russell on Arb., 8d ed. pp. 422, 423, citing Com. Dig. Arb. E. 13; Rolle's Abr. Arb. F. 1, p. 248; *Phillips v. Knightley*, Fitzg. 272; *Dudley v. Mallery*, 3 Leon. 62; *Linch v. Clemence*, Lutw. 571; *Bradsey v. Clyston*, Cro. Car. 541; Bac. Abr. Arb. E. 4; Anon. March, 18; *Beckett v. Taylor*, 1 Mod. 9; 2 Keb. 546, 554; *Kirk v. Unwin*, 6 Exch. 908. And see *Martin v. Williams*, 13 Johns. 264, discussed *post*.

<sup>2</sup> *Shelf v. Baily*, 1 Com. R. 183; *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Cayhill v. Fitzgerald*, 1 Wils. 28, 58; *Adams v. Statham*, 2 Lev. 235; *Browne v. Meverell*, Dyer, 216, b.

<sup>3</sup> *Martin v. Williams*, 13 Johns. 264, and cases cited below.



have been based upon this fact of his disability to compel performance by them, and might have been to a different effect had he possessed the power of compulsion.<sup>1</sup>

**Effect of Performance of such Non-enforceable Orders.** — It has been said, that an offer by the person to perform such an order, in itself not legally enforceable, or *a fortiori*, his actual performance of it will render valid and enforceable the rest of the award which is founded upon this order as a consideration.<sup>2</sup> In *Smith v. Sweeny* the matter submitted concerned certain real estate, which, in fact, belonged to the wife of one party, and not to the party himself. A release of this land was ordered to be executed to the other party. The wife did in fact execute such release, and it was tendered simultaneously with service of the award. It was held, on the strength of the other cases cited, that this voluntary compliance by the wife removed the objection, which would otherwise have been good, on the ground of the non-enforceability of the order and its being in excess of authority. But Judge Peckham, in enunciating this rule, did not seem wholly satisfied with its soundness, and pointed out the objection to it: that it leaves to the option of the person who is affected by the intrinsically void order to determine whether or not the award shall stand, whereas, as a general rule, there should be no such option.

**Reference of Cross-Actions.** — Under a reference of cross-actions, to one arbitrator, he may generally award that one claim be set off against the other, and order the balance only to be paid.<sup>3</sup>

**Arbitrators cannot name a Substitute.** — Arbitrators or ref-

<sup>1</sup> See *ante*, "Order that an Act be done by a Stranger," p. 203.

<sup>2</sup> *Smith v. Sweeny*, 35 N. Y. 291; *Nichols v. Rensselaer Co. M. Ins. Co.*, 22 Wend. 129; *Schuyler v. Van Der Veer*, 2 Caines, 235; *Lee v. Elkins*, 12 Mod. 585. By analogy, *Page v. Monks*, 5 Gray, 492, might bear indirectly upon this principle.

<sup>3</sup> *Pennell v. Walker*, 26 L. J. C. P. 9; *Maloney v. Stockley*, 4 Man. & Gr. 647; *Williams v. Mouldsdales*, 7 Mee. & W. 134.

erees have no inherent power to name a substitute for one of their number who is unable or unwilling to act. It is an act of the like import with a delegation of authority of a judicial nature, which, as has already been seen, is wholly irregular. Where a submission naming three referees provided that, in the absence of any of them, "another or others are to be chosen in their room," it was held that the choice could be made only by the parties. There was nothing in this language indicative of an intention of the parties to part with their right to select their own referees. This power still rested with them exclusively.<sup>1</sup>

But where the parties named two referees, with power, in case of their failing to agree, to "choose one or more with them," the two did fail to agree, and chose three more to sit with them. The parties appeared, and proceeded with the hearing before the five without preferring any objection. Held, they were bound by the award as much as if they had named all five in the original submission. The ruling was apparently based in part on the fact that the choice was sufficiently regular, and partly on the waiver of objection, if any could have been made, by appearing and proceeding. The court did not select between the two reasons.<sup>2</sup>

**The Arbitrator's Power in a *lis pendens*.**— It has been held that arbitrators in a *lis pendens* may award to the plaintiff a larger sum than the *ad damnum* laid in the writ.<sup>3</sup> The proceedings in this case were of a singularly anomalous character. But there was evidently no rule of court, and the submission does not appear to have been a regular proceeding in the cause. Had it been so, or had there been a rule, it is conceivable that a quite different principle might have been enunciated.

If a cause in equity is submitted upon the pleadings, the

<sup>1</sup> Potter v. Sterrett, 24 Penn. St. 411. And see Russell v. Gray, 6 Serg. & R. 145.

<sup>2</sup> Norton v. Savage, 10 Maine (1 Fairf.) 455.

<sup>3</sup> Sutton v. Dickinson, 9 Leigh, 142.

arbitrators are not bound to accept as the basis of their decision the principles of law asserted in the bill.<sup>1</sup>

**The Arbitrator's Power to allow Amendments where the Submission is in or of a *lis pendens*.** — Where the submission is of a *lis pendens*, whether *in pais* or as part of the proceedings in the cause by virtue of a statute or a rule of court, the general rule is, as already laid down, that the authority of the arbitrators is confined to the precise matter submitted. That matter is the substantial question or questions, whether of law or fact, which are put at issue in the suit. What these questions are, is to be determined from the pleadings and the papers filed in the cause. But this broad principle is subject to the very important qualification that any matters which might have been introduced into the trial of the cause in court, under any amendment legally allowable by the court, are regarded as embraced within the submission and as properly before the arbitrator for consideration and determination.<sup>2</sup> And the courts are inclined to go to the extreme verge of liberality in allowing such an extension of the subject-matter before the arbitrator by virtue of this rule as may be necessary for securing the trial and determination of the real matters in controversy.<sup>3</sup> The case, it is said, is to be heard and decided upon its merits, without regard to the technical issues joined by the pleadings.<sup>4</sup> It has been laid down that even where it is a "part of the submission or rule of reference, that the arbitrator or referee is to be governed by the rules of law, it is nevertheless the cause of action which forms the basis of the submission, and not the par-

<sup>1</sup> *Smith v. Virgin*, 33 Maine, 148.

<sup>2</sup> *Sumner v. Brown*, 34 Vt. 194; *Fulton v. Wiley*, 32 id. 762; *Clifford v. Richardson*, 18 id. 620; *Maxfield v. Scott*, 17 id. 634; *Waterman v. Connecticut & Passumpsic Rivers R.R. Co.*, 30 id. 610; *Merrill v. Gold*, 1 Cush. 457. See in chapter on the *Submission*, under "Submission of a Cause," a full abstract of this last case and further remarks on this subject.

<sup>3</sup> *Sumner v. Brown*, 34 Vt. 194; *contra*, see *De la Riva v. Berreyesa*, 2 Cal. 195.

<sup>4</sup> *Eddy v. Sprague*, 10 Vt. 216; *Davis v. Campbell*, 23 id. 236; *Coffin v. Cottle*, 4 Pick. 454; *Page v. Monks*, 5 Gray, 492; *Briggs v. Oaks*, 28 Vt. 138.

ticular form of the declaration which the party has adopted, or any particular issue which may have been formed upon it, and that, therefore, the referee is not bound by the particular declaration and pleadings, but may award upon the subject-matter of the suit without regard to them.”<sup>1</sup> According to the language of some other cases, he may try the cause of action on its merits, and not the particular issue joined in court.<sup>2</sup>

Judge Curtis, in the United States Circuit Court, laid down substantially the same rule, saying that the referee, though he might not allow formal defects to be amended, might disregard them, and might take into consideration any subject-matter substantially embraced in the declaration.<sup>3</sup>

In the same case, in the Supreme Court of the United States, the court said, “the law is well settled that by the reference of an action . . . nothing is included in the submission but the subject-matter involved in it” (the action). A railroad company had covenanted to pay a contractor partly in shares. He sued for breach of covenant, and alleged breaches co-extensive with the covenant. The arbitrator included in his award damages for non-delivery of the shares. It was held that he did rightly, since the averments of the declaration had “this scope and operation.”<sup>4</sup>

**Limitations upon the Power to allow Amendments by the Plaintiff.** — But the liberality of the courts will not be stretched to the point of allowing the introduction of a new subject-matter of litigation, or of a new substantive cause of action different from that upon which the plaintiff intended to declare and rely at the time of the institution of his action.<sup>5</sup>

In the lower courts of New York it has been said that a

<sup>1</sup> *Cook v. Carpenter*, 34 Vt. 121.

<sup>2</sup> *Hicks v. Cottrill*, 25 Vt. 80; *Eddy v. Sprague*, 10 id. 216; *Spaulding v. Warren*, 25 id. 316.

<sup>3</sup> *Myers v. York & Cumberland R.R. Co.*, 2 Curtis C. C. 28.

<sup>4</sup> *York & Cumberland R.R. Co. v. Myers*, 18 How. (U. S.) 246.

<sup>5</sup> *Sumner v. Brown*, 34 Vt. 194; *Cook v. Carpenter*, ib. 121.

referee under the Code may allow amendments to be made to remedy an immaterial variance. But his power is by no means so extensive as that of the court.<sup>1</sup> Though there is a case wherein he has been permitted to allow the addition of a "new cause of action," which demanded the same sum as that already demanded in the causes alleged.<sup>2</sup> But these decisions, it should be remembered, are under the statute.

In New York it has also been held that either party waives his objection to the allowance of an amendment by amending his own pleadings to meet the alteration in those of his adversary.<sup>3</sup>

**Limitations upon the Power to allow Amendments by the Defendant.** — Similar rules also affect the power of the arbitrator to allow amendments of his defence by the defendant. The strict rule is, that if the pleadings could be amended to admit the defence offered, it may be considered by the arbitrators.<sup>4</sup> And a case in the Supreme Court of New York would allow amendments before a referee, though they should go to the entire scope and meaning of the defence.<sup>5</sup> There is no reason to suppose, however, that the liberality shown to the defendant in this respect would be any greater in proportion than that shown to the plaintiff. Thus a defendant cannot, by amendment or otherwise, rely before the referee on the Statute of Limitations when he had not pleaded it in the cause.<sup>6</sup>

**Power to consider a Claim in Offset.** — If no claim in offset has been filed before the cause is referred, the referee cannot admit or consider any such claim.<sup>7</sup> And if a claim for unliquidated damages has been filed in offset, which could not be thus

<sup>1</sup> *Union Bank v. Mott*, 18 How. Pr. 506; 19 id. 267; *Hoyt v. Hoyt*, 8 Bosw. 511.

<sup>2</sup> *Secor v. Law*, 9 Bosw. 163.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Van Buskirk v. Stow*, 42 Barb. 9.

<sup>5</sup> *Johnson v. McIntosh*, 31 Barb. 267.

<sup>6</sup> *Ford v. Ford*, 53 Barb. 525.

<sup>7</sup> *Fulton v. Wiley*, 32 Vt. 762; *Woodruff v. Hurson*, 32 Barb. 557.

availed of at law, the arbitrator should reject it from consideration.<sup>1</sup>

**The Allowance of Amendments is discretionary.** — Motions to amend the pleadings so as to allow the introduction of evidence, if within the authority of the referee to grant, are addressed to his discretion. No appeal or exception will lie to his decision.<sup>2</sup> But *quære*, whether the power of the referee extends to allowing the amendment, or simply to disregarding the defect?<sup>3</sup> An examination of the cases cited in the discussion of this topic of the power of the arbitrator to allow amendments will not be found to furnish any satisfactory answer to this query. Sometimes it is said that the arbitrator may permit the amendment to be made, sometimes that the scope of his authority extends to the substantive cause of action and defence. But, as matter of technicality and practice, the extent of his authority to allow actual formal amendments, and the manner in which this authority, such as it may be, is to be exercised, are points concerning which no clear information is furnished by the adjudications.

In New York it was said that, before the Code, a referee had no power to grant any amendments to the pleadings, in an action pending before him. But the Code, § 272, gives him the same powers of this nature as are possessed by the court on the trial of the cause.<sup>4</sup>

**Who may object if the Arbitrator exceeds his Authority.** — Only the party prejudiced by the exercise of excessive authority by the arbitrator is entitled to object to the award by reason of it. The party in whose favor the erroneous action of the referees operates cannot be heard to impeach the validity of the award on this ground.<sup>5</sup> A party objected to an award because

<sup>1</sup> *Harrison v. Wortham*, 8 Leigh, 296.

<sup>2</sup> *Woodruff v. Hurson*, 32 Barb. 557.

<sup>3</sup> *Vide Myers v. York & Cumberland R.R. Co.*, 2 Curtis C. C. 28, *ante*, p. 208.

<sup>4</sup> *Ford v. Ford*, 53 Barb. 525.

<sup>5</sup> *Lyman v. Arms*, 5 Pick. 213; *Galvin v. Thompson*, 13 Maine, 367; *In re Bradshaw and the East and West India Docks, &c.*, 12 Q. B. 562.

it made certain deductions from demands presented against him by his adversary, and assigned to himself certain goods and merchandise. He contended that these acts were beyond the authority of the referees. The court said: "He has no right of complaint; it was in his favor."<sup>1</sup>

**How the Objection of Excess of Authority may be availed of; Rules of Pleading.**—The practice in England appears to be, where there has been an excess of authority by the arbitrator, that the party aggrieved thereby may avail himself of the defect by a motion to set aside the award. Russell says: "That the arbitrator has exceeded his authority is often a good ground of motion. It is so in all cases, unless the bad part is clearly separable from the rest of the award and does not affect the good part."<sup>2</sup> This, of course, presupposes that the award is, by some means or other, returnable into court; for otherwise the court would have no jurisdiction to entertain a motion. If the proceedings be wholly *in pais*, it is obvious that this defect, like any other, can be availed of in the first instance only by a bill in equity to avoid the award; or in defence to a suit on the award as hereinafter indicated.

In this country the fact that an arbitrator in making his award has either acted altogether without authority, or that he has in some part of his award exceeded his authority, may be pleaded and shown in defence to a suit at law upon the bond and award. It is regarded as a defence of an entirely different nature from an attempt to impeach an award on the ground of partiality, fraud, mistake, want of mutuality, certainty, finality, or other defect of the like nature.<sup>3</sup>

<sup>1</sup> *Lyman v. Arms*, 5 Pick. 213.

<sup>2</sup> Russell on Arb., 3d ed. p. 661, citing as instances the following cases, to wit: *Tandy v. Tandy*, 9 Dowl. 1044; *Warren v. Green*, Ca. temp. Finch, 141; *Morgan v. Mather*, 2 Ves. Jr. 15; *Boodle v. Davies*, 3 Ad. & El. 200; *Seckham v. Bobb*, 8 Dowl. 167; *Price v. Popkin*, 10 Ad. & El. 139; *Ross v. Boards*, 8 id. 290; *In re Morphett*, 2 Dowl. & Low. 967; *Wood v. Wilson*, 2 Cr. Mee. & R. 241; *In re Mackay*, 2 Ad. & El. 356; *Turner v. Swainson*, 1 Mee. & W. 572. Nearly all these cases have been already stated in the preceding parts of this chapter.

<sup>3</sup> *Relyea v. Ramsay*, 2 Wend. 602; *Woodbury v. Northy*, 3 Greenl. 85. And

In the famous case of *Boston Water Power Company v. Gray*,<sup>1</sup> the plaintiffs, in an action of covenant broken, counted upon an indenture of submission and the award made thereunder. The general issue was pleaded and joined, and the defendant filed a specification of defence. Excess of authority in divers particulars was, among other things, relied upon by the defendant, and no question appears to have been raised as to the sufficiency or propriety of the pleadings.

In a suit growing out of partnership disputes, a reference was had by order of court. The report was accepted, and judgment rendered thereon, to which one of the parties excepted. As a ground of exception, excess of authority was alleged, and no objection was made to the propriety of this course of proceeding.<sup>2</sup>

In an action of debt upon an arbitration bond, the defendant pleaded *non est factum*, with a brief statement that the award was void for the reason that the arbitrators had exceeded their authority in certain specified particulars. No objection was taken to the form of the plea, or to the propriety of this method of availing of the objection.<sup>3</sup>

Excess of authority may apparently be availed of in defence against a motion for entry of judgment on an award returned into court.<sup>4</sup>

An award having been accepted by the Court of Common Pleas, and judgment rendered thereon, the plaintiff sued out a writ of error, assigning, among other errors, excess of authority by the arbitrators in certain particulars. The defendants in error moved to quash the writ, on the ground that the proceedings should have been by petition for a writ of *certiorari*.

see *Worthen v. Stevens*, 4 Mass. 448 ; *Culver v. Ashley*, 17 Pick. 98 ; *Shearer v. Handy*, 22 id. 417.

<sup>1</sup> 6 Metc. (Mass.) 131.

<sup>2</sup> *Cook v. Carpenter*, 34 Vt. 121.

<sup>3</sup> *Richardson v. Huggins*, 23 N. H. 106.

<sup>4</sup> *Berkshire Woollen Co. v. Day*, 12 Cush. 128 ; *Boston & Worcester Railroad Corporation v. Western Railroad Company*, 14 Gray, 253 ; *Merrill v. Gold*, 1 Cush. 457.



The court said it was too late to call in question the proceeding by error instead of *certiorari*. Until the distinction was taken by C. J. Parsons,<sup>1</sup> error was most commonly brought in cases more proper for *certiorari*, but the court appear not to have seen any objection to error in a case like this; possibly because the judgment is rendered in a common-law court. It is true the judgment here can be only affirmed or reversed; but that may be either in part or in whole. A *venire facias de novo* cannot be ordered because there was no writ and no jury.<sup>2</sup>

In New Hampshire it is said that when an award is relied upon in bar, an excess of authority on the part of the arbitrator in making his award should be taken advantage of by the plaintiff by demurrer.<sup>3</sup>

But in Massachusetts no demurrer was required in a similar case. The action was in contract for labor and materials furnished. The answer was an oral submission and a written award, which was set forth. Apparently there were no further pleadings in the cause. The court held that the plaintiff was entitled to testify as to what he in fact submitted, and if this showed an excess of authority in the award, then the award was no bar.<sup>4</sup>

**Evidence as to Excess of Authority.** — As a natural corollary to the rule allowing excess of authority to be pleaded in a suit at law, we find also the rule that parol evidence is admissible to show that arbitrators have gone beyond the authority delegated to them by the submission, and have considered and adjudicated upon matters not comprehended within its terms. The rule holds good, although both the submission and the award be in writing. For testimony to this effect is not offered for the purpose of varying the import of a written instrument, but in

<sup>1</sup> In *Savage v. Gulliver*, 4 Mass. 171.

<sup>2</sup> *Lyman v. Arms*, 5 Pick. 213.

<sup>3</sup> *Cheshire Bank v. Robinson*, 2 N. H. 126.

<sup>4</sup> *Cook v. Jaques*, 15 Gray, 59.

order to show that the acts of the arbitrators did not fall within the undisputed intendment of that instrument.<sup>1</sup> And it has been held that parol evidence is admissible in a suit on an award to show what matters were in fact submitted, where the submission was oral,<sup>2</sup> and also to show what matters were brought to the notice of the arbitrators.<sup>3</sup>

The evidence of the arbitrators themselves, which must often be the best and sometimes the only means of proving the fact of excess, appears to be available to the objecting party for this purpose.<sup>4</sup> It has been held that the arbitrators are competent witnesses to prove what matters were presented before them,<sup>5</sup> and what claims were or were not included in their award;<sup>6</sup> also, as to the time when, and the circumstances under which the award was made.<sup>7</sup>

**The Arbitrator is the Final Judge of both Law and Fact.** — Unless otherwise restricted by the submission or rule of court, arbitrators and referees are final judges, not only of all matters of fact, but also of all questions of law which arise in the course of the proceedings before them, or which are involved in the decision of the subject of the submission.<sup>8</sup>

The same rule concerning the authority of an arbitrator is established also in England.<sup>9</sup> Sometimes, it has been said, he

<sup>1</sup> *Butler v. Mayor, &c., of New York*, 7 Hill, 329.

<sup>2</sup> *Cook v. Jaques*, 15 Gray, 59.

<sup>3</sup> *Walker v. Walker*, 1 Wins. (N. C.) No. 1, 259.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 468; *Woodbury v. Northy*, 3 Greenl. 85.

<sup>5</sup> *Spruck v. Crook*, 19 Ill. 415.

<sup>6</sup> *Hale v. Huse*, 10 Gray, 99.

<sup>7</sup> *Woodbury v. Northy*, 3 Greenl. 85.

<sup>8</sup> *White Mountains Railroad v. Beane*, 39 N. H. 107; *Kleine v. Catara*, 2 Gall. 61; *Myers v. York & Cumberland R.R. Co.*, 2 Curtis C. C. 28; *Brown v. Clay*, 31 Maine, 518; *Boston Water Power Co. v. Gray*, 6 Metc. (Mass.) 131; *Johnson v. Noble*, 13 N. H. 286; *Walker v. Sanborn*, 8 Greenl. 288; *Smith v. Thorndike*, ib. 119; *Whitmore v. Le Ballistier*, 35 Maine, 488; *Sweetsir v. Kenney*, 32 id. 464; *Indiana Central R.R. Co. v. Bradley*, 7 Ind. 49; *Tyler v. Dyer*, 13 Maine, 41; *Haseltine v. Smith*, 3 Vt. 535; *Downer v. Downer*, 11 id. 395; *Bliss v. Rolins*, 6 id. 529; *Bigelow v. Newell*, 10 Pick. 348; *Rundell v. La Fleur*, 6 Allen, 480; *Hall v. Decker*, 51 Maine, 31.

<sup>9</sup> *Payne v. Massey*, 9 J. B. Moore, 666; *Cramp v. Symons*, 7 id. 434; 1 Bing.

fulfils the functions of a jury ;<sup>1</sup> sometimes of a judge at Nisi Prius ;<sup>2</sup> sometimes of the court in banc ;<sup>3</sup> sometimes of a master in chancery ;<sup>4</sup> sometimes of the chancellor himself.<sup>5</sup>

**Whether or not the Arbitrator ought to conform to strictly Legal Principles.** — Cognate to this broad general principle, and often discussed and sometimes confounded with it, is the really distinct matter: by what principles the arbitrator or referee should be guided in making up his decision? Is he obliged to be governed, at least so far as his knowledge will permit, by the principles of law, or can he deliberately and intentionally throw these overboard, and determine the controversy according to what he regards as equity and good conscience? It will be seen that the rule that he is a final judge both of law and fact, is by no means equivalent to giving him power of the latter description. For he may well be held bound to attempt to decide according to law; though if his attempt be unsuccessful in the view of a court at law, the result at which he has arrived will yet not be interfered with. It is one thing to say that he must strive to conform to legal principles; but quite another to say that if he fails to do so in any particular his award shall therefore be void. In too many of the decisions this distinction, substantial and obvious as it is, has not been observed, and the discussion of the subject and the effort to lay down a satisfactory and intelligent rule is thereby rendered needlessly difficult.

Russell “ hazards as the safest general rule that can be drawn from a consideration of the cases, — that an arbitrator should

104; *Morgan v. Mather*, 2 Ves. 17; *Dick v. Milligan*, ib. 23; *Armstrong v. Marshall*, 4 Dowl. 593; *Perriman v. Steggall*, 9 Bing. 679; *Angus v. Retford*, 11 Mee. & W. 69; 2 Dowl. n. s. 735.

<sup>1</sup> *Angus v. Retford*, 11 Mee. & W. 69; 2 Dowl. n. s. 735; *Lee v. Lingard*, 1 East, 400; *Borrowdale v. Hitchener*, 3 Bos. & P. 244; *Bury v. Dunn*, 1 Dowl. & Low. 141; *Boutillier v. Thick*, 1 Dowl. & Ry. 366.

<sup>2</sup> *Caila v. Elgood*, 2 Dowl. & Ry. 193.

<sup>3</sup> *Allen v. Lowe*, 4 Q. B. 66.

<sup>4</sup> *Knox v. Symmonds*, 1 Ves. Jr. 369.

<sup>5</sup> *Pitcher v. Rigby*, 9 Price, 79.

endeavor to arrive at his conclusions upon the same rules and principles which would have actuated the tribunal or tribunals for which he is substituted in coming to a decision.”<sup>1</sup> Thus it is his opinion that at a reference at Nisi Prius the referee should be governed by the principles which a judge at Nisi Prius would lay down for the guidance of the jury. Though he admits that in such a case, where Lord Kenyon thought that the arbitrator had cut the knot rather than unloosed it, according to strict rules of law, his Lordship expressed no disapprobation.<sup>2</sup>

After remarking the unquestionable fact, that it is hard to reconcile the various statements of judges concerning the principles by which an arbitrator should be guided, he further lays down another “general rule, that an arbitrator, like every other judge, is bound by the rules of law,<sup>3</sup> and that it is beyond his authority to award any thing contrary to law. For the ordinary presumption is, that the parties intend to submit to him only the legal consequences of their transactions and engagements.<sup>4</sup> So that when parties refer their *legal* rights to arbitration, the arbitrator must endeavor to award according to law, although a mere mistake in law is rarely fatal to the award.”<sup>5</sup>

But the word *legal*, he says, is used in “an enlarged sense, for the arbitrator on a general reference should take into his consideration the rights of the parties in equity as well as at common law.”<sup>6</sup>

It is with diffidence that I venture to differ from a writer, so thoroughly a master of his subject, upon a point so important. Yet it seems to me that Russell lays down the rule in

<sup>1</sup> Russell on Arb., 3d ed. p. 111.

<sup>2</sup> Habershon v. Troby, 3 Esp. 38.

<sup>3</sup> Aubert v. Maze, 2 Bos. & P. 375; *In re* Badger, 2 Barn. & Ald. 691.

<sup>4</sup> *In re* Badger, 2 Barn. & Ald. 691; *Morgan v. Mather*, 2 Ves. Jr. 15; *Young v. Walter*, 9 id. 364.

<sup>5</sup> Russell on Arb., 3d ed. pp. 111, 112; *Blennerhassett v. Day*, 2 Ball & Beatty, 104.

<sup>6</sup> *Delver v. Barnes*, 1 Taunt. 48; *Craven v. Craven*, 7 id. 642.

conformity to what he very justly conceives it should be upon sound abstract principles, rather than in conformity to the current of adjudication even in England. Certainly the tribunals in the United States have asserted the contrary doctrine; and I conceive that in this country, the general rule must be admitted to be established, to the effect that arbitrators are at liberty voluntarily and deliberately to disregard the strict principles of law, and to decide according to their general views of what is right, just, and conscientious in the case.<sup>1</sup>

It may be worth while to give the language of the courts in a few instances, as follows: Where the submission does not restrict the arbitrators to decide according to strict principles of law, "they are not bound to decide upon 'mere dry principles of law,' but may make their award *ex æquo et bono*."<sup>2</sup> "The referees, being judges of the parties' choice, are not obliged to decide upon the strict principles of law, but may disregard them altogether, and adopt certain principles of equity or justice to govern their decision."<sup>3</sup> If under an unqualified submission, "knowing what the law is, the referees choose to disregard it, and decide according to what they think to be the equity and good conscience of the case, the report is not, for this cause, to be rejected."<sup>4</sup>

Judge Story gives it as a reason why an arbitrator's decision on matter of law or fact should be final, that under an unrestricted submission "the reasonable rule seems to be, that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex æquo et bono*." He goes on to say that, there-

<sup>1</sup> Tyler v. Dyer, 13 Maine, 41; Kleine v. Catara, 2 Gall. 61; Sweetsir v. Kenney, 32 id. 464; Hollingsworth v. Leiper, 1 Dall. 161; Hazeltine v. Smith, 3 Vt. 535; Downer v. Downer, 11 id. 371; Cushman v. Wooster, 45 N. H. 410; Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131; Greenough v. Rolfe, 4 N. H. 357.

<sup>2</sup> Johnson v. Noble, 13 N. H. 286.

<sup>3</sup> Hazeltine v. Smith, 3 Vt. 535. So also Downer v. Downer, 11 id. 395.

<sup>4</sup> Greenough v. Rolfe, 4 N. H. 357.

fore, if the referees mean to take upon themselves the whole responsibility, they may do so without interference by the court.<sup>1</sup>

The referees "had all the powers of any court of law and of any court of equity." It does not appear that they may not have acted "upon their view of the equity and justice of the case."<sup>2</sup>

It is obvious that the phrase "equity" is not used in the preceding cases in a technical sense, as in the last quotation from Russell. It is not the treatment which a court of equity would give the case which it is said that the arbitrator may give it. The immediate connection of the word with some equivalent or explanatory phrase, like "justice" or "good conscience," shows that the force of the language is broad and liberal. •

The value of the preceding decisions, as bearing upon this precise point, must be acknowledged to be somewhat diminished by the fact, which becomes obvious on an examination of the whole opinion in nearly every instance, that the court confounded this matter with the rule of finality, or more properly conclusiveness, in the decision, and treated them as substantially the same, or as though the rule of conclusiveness or finality in the decision necessarily and logically drew after it this allowance of latitude in the principles upon which that decision ought to be founded.

I must also say that I do not think Mr. Russell is much better supported by the English cases than he would be by those of the United States, did he regard the latter as authorities. The English cases seem, for the most part, to be to the same effect as our own, though in a more clear-headed and satisfactory way. For example, it is said that arbitrators "in some

<sup>1</sup> *Kleine v. Catara*, 2 Gall. 61; relying on the following authorities: *South Sea Company v. Bumstead*, 2 Eq. Ca. Abr. 80; *Knox v. Symmonds*, 1 Ves. Jr. 369; *Delver v. Barnes*, 1 Taunt. 47; for all which see *post*.

<sup>2</sup> *Sweetsir v. Kenney*, 32 Maine, 464.

respects have a greater latitude, not being confined within the rules of law or equity, and therefore may make such allowances as could not be admitted in courts of judicature.”<sup>1</sup> Lord Thurlow said, “the arbitrator has a greater latitude than the court, in order to do complete justice between the parties. For example, he may relieve against a right which bears hard upon one party, but which, having been acquired legally and without fraud, could not be resisted in a court of justice.”<sup>2</sup> Chief Justice Mansfield said: “In a reference of all matters in difference an arbitrator ought to consider not legal only, but also equitable demands, — demands of all sorts. . . . Besides, if the arbitrator is not right in the point of strict law, he is certainly right in every other point. The sum of £100 was really due in conscience; the court ought not to set aside such an award unless they are compelled so to do, and I recollect no case where an award has been set aside upon such a suggestion.”<sup>3</sup>

Russell himself, citing the preceding and other cases,<sup>4</sup> is obliged to say that “it has been said by judges of great celebrity that under a general reference of all matters in difference, the arbitrator is not confined within the rules of law and equity, that he has greater latitude than the courts of law, in order to do complete justice between the parties, and that he may take all moral questions into consideration in forming his judgment, and decide according to equity and good conscience.”<sup>5</sup> And he adds that “in one instance the Court of Queen’s Bench is said to have laid down the following rule: ‘that when arbitrators knowing what the law is, or laying it entirely out of their consideration, make what they conceive, under all the circumstances, to be an equitable decision, it is

<sup>1</sup> *South Sea Company v. Bumstead*, 2 Eq. Ca. Abr. 80, *per* Talbot, Chanc.

<sup>2</sup> *Knox v. Symmonds*, 1 Ves. Jr. 369.

<sup>3</sup> *Delver v. Barnes*, 1 Taunt. 47.

<sup>4</sup> *Young v. Walter*, 9 Ves. Jr. 364; *Hanson v. Liversedge*, 2 Vent. 242.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 113.

no objection to the award that in some particular point it is manifestly against law.'"<sup>1</sup> Also a dictum of Wilde, C. J., in a recent case, that the courts will not set aside an award, for a mistake in law, unless they can distinctly see on the face of the award that the arbitrator, professing and intending to decide according to law, has unintentionally and mistakenly decided contrary to it,<sup>2</sup> may be quoted to the same effect.

"But," he says, "these and similar general observations must, in general at least, it is humbly suggested, be considered and explained in reference to the matters in dispute in the particular case, showing the intention of the parties to give the arbitrator power beyond law."<sup>3</sup> Yet even the slender shadow of authority,<sup>4</sup> which he furnishes for this rule, goes no further than to show that in one instance where the arbitrators did voluntarily decide contrary to rules of law, they were probably empowered to do so by the submission. It certainly does not show negatively and generally that where they are not so empowered they have not such authority.

**Power of Arbitrator to save Questions of Law for the Court.**

—It is very common for an arbitrator to refrain from exercising his full authority as a final judge of points of law arising in the conduct or decision of the arbitration. He often finds the facts and decides in the alternative, leaving the question of law to be determined by the regularly constituted tribunals. This matter is discussed elsewhere in its appropriate place.<sup>5</sup> It is only necessary here to remark that he is under no obligation to take this course, even though requested so to do by a party.

<sup>1</sup> *Ainsley v. Goff*, B. R. 1799; Kyd on Awards, 351.

<sup>2</sup> *Fuller v. Fenwick*, 3 C. B. 705.

<sup>3</sup> Russell on Arb., 3d ed. p. 113.

<sup>4</sup> *Ainsley v. Goff*, *supra*.

<sup>5</sup> See *ante*, Chapter V. pp. 140, 141. "The referee may leave the question of admissibility to the court;" also the discussion concerning awards in the alternative: *Boston Water Power v. Gray*, 6 Metc. (Mass.) 181, p. 168.



An action was referred to an arbitrator, with the stipulation that he should "be at liberty to raise any point of law for the opinion of the court, at the request of either of the said parties." He was requested to state a certain question for the opinion of the court, but refused to do so. The court held the power to be distributive, and that he was not bound to raise any question of law. The clause was to be construed as enabling, not as compulsory.<sup>1</sup>

**An Arbitrator may consider Defences not strictly Legal.** — The rule that an arbitrator is not bound even to attempt to decide in conformity with law derives some degree of corroboration from the fact, as shown by some of the cases already stated in this connection, that he may consider matters by way of defence or otherwise, which could not have been relied upon for the same purpose at law, or probably even in equity.

Though an arbitrator, on questions of mixed law and fact, has made allowance for transactions apparently illegal, as premiums of insurance on a voyage to a hostile port, the court will not set aside the award.<sup>2</sup> And arbitrators may sometimes award a sum to be paid in consideration of a claim not enforceable at law.<sup>3</sup>

Where arbitrators are required by the submission to pass upon "the construction" of a contract, and to make it "the basis" of a settlement of disputes between the parties, their decision will be final, even though they appear to have exceeded in favor of one party the strict and literal provisions in his behalf contained in the contract.<sup>4</sup>

If it is contended that a deed is erroneously drawn up, the arbitrator may, in virtue of his equitable authority, reform it,

<sup>1</sup> *Wood v. Hotham*, 5 Mee. & W. 674.

<sup>2</sup> *Wohlenberg v. Lageman*, 6 Taunt. 254.

<sup>3</sup> *Mitchell v. Bush*, 7 Cow. 185.

<sup>4</sup> *Porter v. Buckfield Branch R.R.*, 32 Maine, 539.

unless he is called upon only to decide upon the construction ; in which case he must take it as it stands.<sup>1</sup>

**Rules of Court Practice.** — Mere rules of practice established by the courts an arbitrator is, of course, never bound to regard or conform to.<sup>2</sup>

<sup>1</sup> *In re Keene & Atkinson*, Exch. Ap. 16, 1847, stated in Russell on Arb., 3d ed. p. 112.

<sup>2</sup> Russell on Arb., 3d ed. p. 112 ; *In re Badger*, 2 Barn. & Ald. 691.

## CHAPTER VII.

### DURATION OF THE ARBITRATOR'S AUTHORITY.

When the duration of authority is limited by the submission.

Construction of specific phrases.

When the submission or rule is silent as to time.

Exhaustion of authority by making an award or report.

Effect of vacating the award.

An arbitrator cannot refuse to deliver his award.

Exceptions to the foregoing general rule.

Revocation in fact and in law.

#### I. Revocation in fact.

Time for making revocation by a party.

Stipulation that the submission shall be irrevocable.

Revocation by one of several who jointly constitute only one party.

Revocation by joint consent of both parties.

The revocation must be notified.

When the right of revocation does not exist.

The revocation of reference by rule of court.

Formality of revocation by a party.

#### II. Revocation in law.

1. By death of party.

2. By death of an arbitrator.

3. By marriage of a *feme sole*, a party.

4. By lunacy of a party.

5. By arbitrator's refusal to act.

6. By the institution of a suit.

7. By neglect to perform a preliminary act.

Revocation through the instrumentality of a stranger.

Revocation by Congress.

Revocation by an agent.

Damages may be claimed for revocation.

The measure of damages.

Pleading revocation.

Effect of submission ceasing to bind a party.

**When the Duration of Authority is limited by the Submission.**—If the submission or rule of court names any time within which the award or report is to be made, the authority of the referees or arbitrators ceases with the expiration of that time. After it has elapsed, they have no power to do any act

whatsoever in the matter of the arbitration, or in relation to the subject-matter thereof.<sup>1</sup>

An exception to this rule, and probably the only exception that can be found to it, is furnished by an early Pennsylvania case, where the rule of court required the referees to return their report to the then "next term." It was held that if they neglected to do so, they might return it to any other subsequent term, or to an adjourned court as part of a term.<sup>2</sup>

Of course there may be an extension of the time, made by the parties themselves, beyond the limitation first set. This extension may either be express, by a direct agreement to extend, or it may be by a waiver of the stipulation as to time, which will be inferred if the parties proceed with the arbitration without objection, after the time has elapsed. But it must be the act of the parties themselves. In Connecticut the court itself is not allowed to extend the time named in a submission or reference entered into in a pending cause by rule and agreement of parties, unless the parties also agree to the extension.<sup>3</sup>

But in Maine it is said, generally, that the cases which show that recommitment cannot be ordered under a submission *in pais*, where the arbitrators are restricted as to time, or where the execution of their power puts an end to their authority, do not furnish precedents in point where the submission is by rule of court. The court may recommit the report or award, not only in order that errors in form may be corrected, but even when the objection extends to the substantial merits of the matter in controversy, and a re-examination of the whole subject is deemed expedient.<sup>4</sup>

It seems almost needless to remark that the arbitrator has

<sup>1</sup> *White v. Puryear*, 10 Yerg. 441 ; *Brower v. Kingsley*, 1 Johns. Ca. 334 ; *Hall v. Hall*, 3 Conn. 308 ; *White v. Kemble*, 2 Penn. 349 ; *Marshall v. Powell*, 9 Q. B. 779.

<sup>2</sup> *Shaw v. Pearce*, 4 Binn. 485.

<sup>3</sup> *Hall v. Hall*, 3 Conn. 308.

<sup>4</sup> *Cumberland v. Inhabitants of North Yarmouth*, 4 Greenl. 459.

no authority, by his own sole action, to extend the limit set to his functions in point of time.

Where parties agreed that a valuation of crops should be made on a certain day named, the time was considered to be of the essence of the contract. A valuation which had been made after that day, was declared not to be binding.<sup>1</sup>

**Construction of Specific Phrases.**—If a submission give a certain time after its execution, the day of execution is not counted.<sup>2</sup> If it give “until” a certain day, the arbitrator may take the whole of that day.<sup>3</sup> The word “months,” without explanation from the context, means lunar months.<sup>4</sup>

**When the Submission or Rule is silent as to Time.**—If no time is named in the submission within which the award is to be made, it is said that the arbitrators may take what time they please.<sup>5</sup> But this privilege is subject to the limitation that they must not, against the will of the parties, inflict an unreasonable delay. At the request of either party they are bound, within a reasonable time, to render an award; and their refusal or neglect to do so would justify the revocation by either contestant of their authority in the premises.<sup>6</sup> But the revocation is essential. The authority does not terminate, without this specific act, simply because an unreasonable time has elapsed. Consequently, in an action of debt on an award made by arbitrators upon a submission in which no time for making the award is named, a plea that the arbitrators did not make the award within a reasonable time, is ill.<sup>7</sup>

In like manner, if an order of reference in a *lis pendens* designates no time for the return of the report, it may continue

<sup>1</sup> *Marshall v. Powell*, 9 Q. B. 779.

<sup>2</sup> *In re Higham v. Jessop*, 9 Dowl. 203.

<sup>3</sup> *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Knox v. Simmonds*, 3 Bro. Ch. Ca. 358.

<sup>4</sup> *In re Swinford*, 6 Maule & Sel. 226.

<sup>5</sup> *Small v. Thurlow*, 37 Maine, 504; *Harrington v. Rich*, 6 Vt. 666; *Rogers v. Tatum*, 1 Dutcher, 281.

<sup>6</sup> *Small v. Thurlow*, 37 Maine, 504; *White v. Puryear*, 10 Yerg. 441; *Curtis v. Potts*, 3 Maule & Sel. 145.

<sup>7</sup> *Curtis v. Potts*, 3 Maule & Sel. 145.

in force indefinitely.<sup>1</sup> But if the referees delay unreasonably, the court will, upon application, grant a rule ordering them either to report or to show cause why an attachment should not issue against them.<sup>2</sup>

**Exhaustion of Authority by making an Award or Report.**—When the arbitrator or referee has made, or, as it is said in some cases, has made and published, his award or report, as a completed instrument, his power is wholly at an end. He has exhausted his authority. He is thoroughly *functus officio*. He can do nothing more in reference to the arbitration or the subject-matter. He cannot reopen the case, nor make a new or supplemental award or report, nor alter or amend the award or report already made, nor file additional, explanatory, alternative or amendatory documents. What he has done must stand or fall, without further aid or assistance from him. He can neither support nor impeach it.<sup>3</sup>

Arbitrators had made and delivered an award, in which some of them apparently joined with reluctance. Two of them testified afterwards that they were misled, and did not intend to award as they had done, and they procured another meeting to correct the award in this respect. The court said that the first award “exhausted the powers of the arbitrators, and they had no more power to make a subsequent award upon the same subject, without the consent of the parties, than they would have had to make an award without any submission.” The admission of the testimony of the arbitrators was also declared to have been wholly improper.<sup>4</sup>

<sup>1</sup> *Harding v. Wallace*, 8 B. Monr. 536; *Tyson v. Robinson*, 3 Iredell, 333; *White v. Puryear*, 10 Yerg. 441.

<sup>2</sup> *Stafford v. Heskett*, 1 Ward, 71; *Brower v. Kingsley*, 1 Johns. Ca. 334.

<sup>3</sup> *Bayne v. Morris*, 1 Wall. 97; *Woodbury v. Northy*, 3 Greenl. 85; *Clement v. Rohraback*, 15 Penn. St. 116; *Aldrich v. Jessiman*, 8 N. H. 516; *Indiana Central R.R. Co. v. Bradley*, 7 Ind. 49; *Lansdale v. Kendall*, 4 Dana, 618; *Cleveland v. Dixon*, 4 J. J. Marsh. 226; *Bigelow v. Maynard*, 4 Cush. 317; *Ward v. Gould*, 5 Pick. 291; *Doke v. James*, 4 Comst. 567; *Smith v. Smith*, 28 Ill. 56; *Fitzgerald v. Fitzgerald*, Hardin, 227; *French v. Moseley*, 1 Littell, 248; *Butler v. Bogles*, 10 Humph. 155; *Brooke v. Mitchell*, 6 Mee. & W. 473; *Henfree v. Bromley*, 6 East, 309; *Trew v. Burton*, 1 Cr. & Mee. 533.

<sup>4</sup> *Doke v. James*, 4 Comst. 567.

A second award, which, by a note annexed to it, the arbitrators said they "considered to be a true explanation of their judgment, and to fix the bounds of the land in controversy," was held to be a mere nullity. By reason of the well-settled rule, that testimony or affidavits of referees or arbitrators are inadmissible to explain or correct their award.<sup>1</sup>

A Pennsylvania statute required an account to be annexed to a report of referees. The report was filed, and on the next day the account was filed. It was held that this was insufficient. The two should have constituted one document, and been filed together. The filing of the account was too late.<sup>2</sup>

Where two instruments, each purporting to be an award, had been prepared, and been delivered respectively to the parties, and were afterwards found to differ materially, it was held that the award was bad. For by the making of one of these papers (whichever was in fact made earlier), the power of the arbitrators was at an end. But since both were delivered together, it was impossible to ascertain which was the actual award, and both must be construed as one transaction, which would then be avoided by the variance; nor would any subsequent determination or selection between these two, though made by the arbitrators, fall within the submission, since they had already exhausted the powers conferred by it upon them.<sup>3</sup>

Arbitrators drew up duplicate instruments setting forth their award, in each of which they made, in a certain part only, an error in the name of one of the parties. In reading one of the instruments, by way of publication to the parties, the error was discovered and corrected in it. But the correction was not made in the other duplicate, which was delivered to one of the parties. An effort was made, on the strength of the decision in *Green v. Lundy* (*supra*), to set aside the award for variance. But the court distinguished the cases, and refused the

<sup>1</sup> *Aldrich v. Jessiman*, 8 N. H. 516.

<sup>2</sup> *Clement v. Rohraback*, 15 Penn. St. 116.

<sup>3</sup> *Green v. Lundy, Cox*, 435.

application: First, because no doubt could have reasonably rested on the intention of the arbitrators; their mistake was evident, and could be rectified without the aid of parol evidence. Second, because the publication of the first and corrected instrument "formed a complete execution of the power" of the arbitrators, whereby "their authority terminated." The delivery of the other duplicate "was a superfluous act, and *superflua non nocent*." <sup>1</sup>

**Effect of Vacating the Award.** — If the award or report is vacated or declared to be void, the authority of the arbitrator or referee is not thereby revived. He cannot again hear the case, unless he is appointed afresh. <sup>2</sup>

**An Arbitrator cannot refuse to Deliver his Award.** — After arbitrators have duly executed their award, and published it to the parties, so that they are really *functi officio*, and have no more to do about it, they cannot destroy its validity as a perfect instrument, and ready to be sued upon, by wrongfully withholding it from the possession of the parties, or either of them. <sup>3</sup>

**Exceptions to the foregoing general Rule.** — Exceptions, properly so called, to the foregoing rule, that the arbitrator after making his award can do no further act in the premises, are very rare. The most important is furnished by the cases which allow the affidavit of an arbitrator to be introduced to show some simple error in fact, like a miscalculation. These will be hereafter discussed in the chapter concerning Mistakes in Law and Fact.

A solitary case in Vermont also breaks through the rigid application of the rule, as follows: Referees had made an error in computation, and discovered it before the sitting of the court to which their report was returnable; a supplemental report

<sup>1</sup> *Schenck v. Voorhees*, 2 Halst. 383.

<sup>2</sup> *Calvert v. Calvert*, 18 Md. 73; *Russell on Arb.*, 3d ed. p. 132; and see *De Groot v. The United States*, 5 Wall. 419.

<sup>3</sup> *Thompson v. Mitchell*, 35 Maine, 281; *Patton v. Baird*, 7 Ired. Eq. 255.



amending the error was allowed to be filed.<sup>1</sup> But a contrary rule has been asserted and enforced in Maine;<sup>2</sup> and the contrary is also the established doctrine in England. Lord Ellenborough said, "that the arbitrator's authority having been once completely exercised, pursuant to the terms of the reference, was at an end, and could not be revived again, even for the purpose of correcting a mistaken calculation of figures," which might indeed include the essential merits of the case. In this instance, inasmuch as the original award was admitted to be erroneous, "it was agreed that both the awards should be set aside."<sup>3</sup>

Recommitment by order of court for the correction of an error, or for a rehearing of the case, may also be said to constitute an exception to the general principle. But it is an exception of which the extent and operation is so well understood, that it introduces no element of uncertainty into the matter.

**Revocation in Fact and in Law.**—At any time before the award is actually made, the authority of the arbitrators may be revoked. Revocation is of two kinds: revocation in fact, and revocation in law. Revocation in fact, or express revocation, is made by the parties to the submission, or by one of them, by the declaration that they or he will not longer abide by the agreement of submission. Revocation in law, or by implication, is the effect or consequence which the law imposes as the necessary legal sequent of some intervening occurrence. As, for example, if a party to the submission die, the law declares the arbitration to be at an end.<sup>4</sup> Though it is not necessary that the event should be thus beyond the control of the party. It may be brought about by his own deliberate act, as will be seen in the further discussion of the subject.

<sup>1</sup> *Hazeltine v. Smith*, 3 Vt. 535.

<sup>2</sup> *Woodbury v. Northy*, 3 Greenl. 85.

<sup>3</sup> *Irvine v. Elton*, 8 East, 54; and see *Ward v. Dean*, 3 Barn. & Ad. 234; *In re Hall and Hinds*, 2 Man. & Gr. 847.

<sup>4</sup> *Sutton v. Tyrrell*, 10 Vt. 91; *Green v. Pole*, 6 Bing. 443.

**I. Revocation in Fact—Time for making Revocation by a Party.**—As a general rule, any person who is a party to a submission may, at any time before award made, revoke the authority of the arbitrator.<sup>1</sup> For this purpose it makes no difference whether the submission be by deed, by parol, or, according to some authorities, by rule of court.<sup>2</sup>

**Stipulation that the Submission shall be Irrevocable.**—Nor is the rule affected by a stipulation, embodied in the submission, providing that it shall be irrevocable. For a man cannot by his own act make that power or authority not countermandable which is by law and of its own nature countermandable.<sup>3</sup>

**Revocation by one of several who jointly constitute only one Party.**—It has been said that a person who is joined with others, so that all of them constitute only one party to the submission, may, by his own sole act, without the concurrence of his associates, revoke the arbitrator's authority.<sup>4</sup> The language of the court was: "It is a general rule, that any party, *or any one of a party*, may revoke his submission before award made." But so far as the words in italics are concerned, the statement of the law is an *obiter dictum*. The question of the power of "one of a party" to revoke was not raised by the case. And, upon the other hand, this doctrine has been denied, and it has been said that, where one or more persons jointly constitute the party of one part, revocation can only be by them

<sup>1</sup> *Allen v. Watson*, 16 Johns. 205; *Marseilles v. Kenton's Executors*, 17 Penn. St. 238; *Erie v. Tracy*, 2 Grant's Ca. 20; *Aspinwall v. Tousey*,<sup>2</sup> Tyler, (Vt.) 328; *Tyson v. Robinson*, 3 Iredell, 333; *Peters' Adm'r v. Craig*, 6 Dana, 307; *Leonard v. House*, 15 Geo. 473; *Bank of Monroe v. Widner*, 11 Paige, 529.

<sup>2</sup> *Power v. Power*, 7 Watts, 205; and see cases cited *supra*; also *Newgate v. Degelder*, 2 Keb. 10, 20, 24 (writing); *Milne v. Gratrix*, 7 East, 607 (bond); *Warburton v. Storr*, 4 Barn. & Cr. 103 (deed); *Green v. Pole*, 6 Bing. 443 (rule of court).

<sup>3</sup> *Tobey v. County of Bristol*, 3 Story, 800; *Power v. Power*, 7 Watts, 205; *Hide v. Petit*, 1 Ca. in Ch. 185; 2 Freem. 133; *Marsh v. Bulteel*, 5 Barn. & Ad. 507; 1 Dowl. & Ry. 106; *Vynior's Case*, 8 Rep. 162.

<sup>4</sup> *Brown v. Leavitt*, 26 Maine, 251.

jointly. An authority jointly given must be jointly taken away.<sup>1</sup>

**Revocation by Joint Consent of both Parties.**—If the revocation by the parties be by joint consent, it may, provided the proceedings be not by rule of court, be either of the entire submission, and therefore of the entire authority of the arbitrators; or it may be only of some portions of the submission, in which case it operates only as a curtailment of the authority of the arbitrators.<sup>2</sup> This is substantially equivalent to the power of the parties, acting together, to alter the submission at any time pending the proceedings. If it be by joint consent, it has been said that it may take place even after the award is made.<sup>3</sup> But, obviously, this is not properly a revocation of the authority, since by the very act of making the award, the arbitrator becomes *functus officio*, and his authority no longer exists. Such an agreement is in fact an agreement to annul the award, and allow the matter in dispute to stand precisely as it did before the submission was entered into. Properly speaking, revocation must, in the nature of things, take place before the award is made. That it should take place afterward, is as much against possibility as it is against law.

**The Revocation must be Notified.**—A revocation is not complete until it has been notified to the arbitrators. Merely writing and signing a revocation is an incomplete act, and insufficient fully to effect the purpose.<sup>4</sup>

**When the Right of Revocation does not Exist.**—But though generally a submission is revocable, being assimilated by the courts to any other power which is naked and without consideration, yet the rule may fall with the reason for the rule. Accordingly where one party had agreed to abandon, and in fact

<sup>1</sup> Robertson v. M'Niel, 12 Wend. 578; Wilde v. Vinor, 1 Brownl. 62; Kyd on Aw. p. 30.

<sup>2</sup> Varney v. Brewster, 14 N. H. 49.

<sup>3</sup> Clement v. Hadlock, 13 N. H. 185.

<sup>4</sup> Allen v. Watson, 10 Johns. 205; Brown v. Leavitt, 26 Maine, 251.

had abandoned, certain proceedings which he had instituted in chancery to compel an accounting by the other, upon consideration that the other would enter into a submission of the matters in difference, it was held that the undertaking of the other was upon sufficient consideration, and he could not annul it by revoking the submission.<sup>1</sup>

And where, as preliminary to entering into a submission in a *is pendens*, one party agreed to waive a default which he was entitled to against his adversary, it was said that the adversary would not afterward be allowed to revoke; or, at least, not unless he abandoned all the benefits of this stipulation to waive his default and allow an answer to be filed.<sup>2</sup>

**No Revocation of Reference by Rule of Court.** — It is said that a reference by rule of court is irrevocable by act of the parties (though revocable, of course, by the court upon good cause shown), and this too although it includes other matters besides those actually involved in the pending cause.<sup>3</sup> “For the object is to place the parties in a situation that either may compel the other to make a final settlement of the dispute.”<sup>4</sup> At any time before the agreement is actually made a rule of court, it remains open to revocation; but to revoke it afterward would, it has been said, constitute a contempt.<sup>5</sup>

**Formality of Revocation by Party.** — The formality of the revocation must follow and conform to the formality of the submission. Thus, if the submission be under seal, so also must be the revocation; if the submission be in writing, the revocation must be written; but if the submission be only verbal, then the revocation may be verbal also. If this rule be not complied with, a revocation which is insufficient under it will

<sup>1</sup> McGheehen v. Duffield, 5 Penn. St. 497.

<sup>2</sup> Bank of Monroe v. Widner, 11 Paige, 529.

<sup>3</sup> Dexter v. Young, 40 N. H. 180; Tyson v. Robinson, 3 Ired. 333; Ferris v. Munn, 2 N. J. 161; Haskell v. Whitney, 12 Mass. 47; Cumberland v. North Yarmouth, 4 Greenl. 459; but see Bank of Monroe v. Widner, 11 Paige, 529.

<sup>4</sup> Bray v. English, 1 Conn. 498.

<sup>5</sup> Frets v. Frets, 1 Cow. 335; but see *ante*, p. 230, n. 2.

be of no effect.<sup>1</sup> Though Russell says, this is not "clearly determined."<sup>2</sup> In pleading a revocation of a submission entered into by bonds, the fact that the revocation was also under seal must be averred, otherwise a demurrer will be sustained.<sup>3</sup>

But it is said in an old case that, if a person revoke in a manner which is in itself insufficient, as if he revoke orally a written submission, yet if neither the arbitrator nor the other party object at the time to the sufficiency of the revocation, *the revoking party* is thereafter estopped to deny its validity in an action brought against him to recover damages for his breach of his agreement.<sup>4</sup>

The instrument of revocation need not be formal, or even grammatical in its language, provided a clear intention to revoke can be gathered from the entire document, full operation will be given to it.<sup>5</sup>

II. **Revocation in Law.** — The nature of revocation in law, or by implication, as it is sometimes called, has been already described. Instances of its occurrence are as follows: —

1. **By Death of a Party.** — The most familiar case in which it takes place is where one of the parties to the submission dies pending the arbitration. As a general rule, this occurrence is a revocation of the arbitrator's authority.<sup>6</sup>

Where a partnership is party to a submission, and pending the arbitration one of the partners dies, it has been held to be competent for the survivors to proceed with the submission, in

<sup>1</sup> Howard v. Cooper, 1 Hill, 44; Relyea v. Ramsay, 2 Wend. 602; Sutton v. Tyrrell, 10 Vt. 91; Mullins v. Arnold, 4 Sneed, (Tenn.) 262; Brown v. Leavitt, 26 Maine, 251. But see Wallis v. Carpenter, 13 Allen, 19; French v. New, 20 Barb. 481.

<sup>2</sup> Russell on Arb., 3d ed. p. 144; and see Barker v. Lees, 2 Keb. 64.

<sup>3</sup> Van Antwerp v. Stewart, 8 Johns. 125.

<sup>4</sup> Hawley v. Hodge, 7 Vt. 237.

<sup>5</sup> Frets v. Frets, 1 Cow. 335.

<sup>6</sup> Marseilles v. Kenton's Executors, 17 Penn. St. 238; Power v. Power, 7 Watts, 205. Dexter v. Young, 40 N. H. 180; Tyson v. Robinson, 3 Iredell, 333; Cain v. Pullam, 1 Hay. 173; Tyler v. Jones, 3 Barn. & Cr. 144; President, &c. v. Van Reenen, 1 Knapp, Pr. C. Rep. 83; Caledonian Railway Co. v. Lockhart, 3 Macq. 808.

like manner as it is competent for them to submit anew. If the submission is by parol, and the surviving partners expressly direct the arbitrator to proceed after the decease, they cannot afterward set up the decease as a revocation of authority.<sup>1</sup> But *semble* that this case would be no authority for holding the estate of the deceased partner to be responsible for the fulfilment of the award.

Where several persons constitute the party of the one part, and one of these persons dies, it is said, by Russell, to be "very questionable, as a general proposition of law," whether the submission will be thereby avoided as to the rest.<sup>2</sup>

But if the submission be by rule of court in a *lis pendens*, the result of death may be different.<sup>3</sup>

Death of a party occurring after the return of an award into court and rendition of an interlocutory decree thereon, but before entry of a final decree, does not operate as a revocation. The award remains binding upon the representatives of the deceased party.<sup>4</sup> But in North Carolina, the death of a party occurring after the report had been returned into court, but before it had been confirmed, whereby an abatement of the suit was brought about, was held to prevent the confirmation of the award.<sup>5</sup>

If the action survives;<sup>6</sup> or if the administrator of the deceased goes on before the referee;<sup>7</sup> or becomes a party to the action;<sup>8</sup> or revives and proceeds with the suit;<sup>9</sup> the award will be good.

2. **By Death of an Arbitrator.** — Another case in which revo-

<sup>1</sup> *Emerson v. Udall*, 8 Vt. 357; and see *Power v. Power*, 7 Watts, 205.

<sup>2</sup> Russell on Arb., 3d ed. p. 159, *et seq.*, where the English cases are discussed. I have found no American decision to this point.

<sup>3</sup> *Freeborn v. Denman*, 3 Halst. 116; and cases *post*.

<sup>4</sup> *Baker's Heirs v. Crockett, Hardin*, (Ky.) 388.

<sup>5</sup> *Farmer v. Frey*, 4 M'Cord, 160.

<sup>6</sup> *Bacon v. Crandon*, 15 Pick. 79; and see *Edmunds v. Cox*, 2 Chitt. 432.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ruston v. Dunwoody*, 1 Binn. 42.

<sup>9</sup> *Wheatley v. Martin's Adm'r*, 6 Leigh, 62.

cation is effected by operation of law is where an arbitrator or referee dies before award made.<sup>1</sup> If he be one of several, this event will operate as a revocation of the power of his associates, even though the submission would in terms enable them to act either jointly or severally.<sup>2</sup>

3. **By Marriage of a Feme Sole, a Party.** — Another instance is the marriage, pending the arbitration, of a *feme sole*, a party to the submission.<sup>3</sup>

It was laid down generally in Vermont, in 1839, by Judge Redfield, that "there can be but little doubt that if a *feme sole*, after submitting to arbitration, intermarry before the award, the power of the arbitrator ceases." In the especial case the *feme sole* was an administratrix, and by statute her power as such was "extinguished by her marriage." It was held that the power she had conferred upon the arbitrators, and upon an attorney to appear and conduct the case before them, expired simultaneously with this extinction of her own power.<sup>4</sup>

The same rule obtains in England.<sup>5</sup>

If one of the parties be a *feme sole*, her marriage will avoid the submission as to all.<sup>6</sup> Since, however, it is her voluntary act, it is a breach of her agreement to submit, and subjects herself and her husband to an action.<sup>7</sup>

4. **By Lunacy of a Party.** — Another instance would be, where one of the parties to the submission should become a lunatic. Though it should be said that this was mentioned only by way of example, in the cited case, and was not the event which had actually occurred.<sup>8</sup>

<sup>1</sup> Sutton v. Tyrrell, 10 Vt. 91; Crawshaw v. Collins, 3 Swanst. 90.

<sup>2</sup> Potter v. Sterrett, 24 Penn. St. 411.

<sup>3</sup> Sutton v. Tyrrell, 10 Vt. 91; Marseilles v. Kenton's Executors, 17 Penn. St. 238.

<sup>4</sup> Abbott v. Keith, 11 Vt. 525.

<sup>5</sup> Charnley v. Winstanley, 5 East, 266; M'Can v. O'Ferrall, 8 Cl. & Fin. 30; Andrews v. Palmer, 4 Barn. & Ald. 250; Saccum v. Norton, 2 Keb. 865.

<sup>6</sup> So say the old authorities: Com. Dig. Arb. D. 5; White v. Gifford, Rolle's Abr. Auth. E. 4, p. 333; Bacon's Abr. Baron & Feme, E.

<sup>7</sup> Charnley v. Winstanley, 5 East, 266.

<sup>8</sup> Sutton v. Tyrrell, 10 Vt. 91.

5. **By Arbitrator's Refusal to Act.** — The refusal of a person named as arbitrator to act as such, or his resignation of the office, will put an end to the submission.<sup>1</sup> Nor is it necessary that the refusal or resignation should be executed with any formality. Though the submission be by writing, under seal, yet the arbitrator may decline orally. Obviously this must be so, for there is no possible means of compelling the persons nominated to fulfil these functions to execute a sealed or even a written instrument, if they do not choose to do so.<sup>2</sup>

6. **By the Institution of a Suit.** — The institution of a suit by one party against the other, after the submission has been entered into, and before the award has been made, the cause of action being the subject-matter of the arbitration, will operate to revoke by implication the agreement to arbitrate.<sup>3</sup> But the entry, on the proper day, of an action, the subject-matter of which was included in the submission, has been held not to constitute a revocation. It was said that this did not prevent the arbitration from proceeding, but was only "an ordinary act of caution" to keep the action in existence, should the other party revoke or refuse to attend; and this was so held in spite of the fact that the submission stipulated that all pending actions should be discontinued. For no time was named for the discontinuance; and it would be sufficient if it should be made when the success of the attempt to arbitrate should be assumed.<sup>4</sup>

7. **By Neglect to Perform a preliminary Act.** — The simple neglect of the parties to perform certain acts, stipulated in the submission, and indispensable to be done before the arbitrators could proceed according to the terms of the submission, has

<sup>1</sup> *Crawshay v. Collins*, 3 Swanst. 90; *Chapman v. Seccomb*, 36 Maine, 102; *Relyea v. Ramsay*, 2 Wend. 602.

<sup>2</sup> *Relyea v. Ramsay*, 2 Wend. 602.

<sup>3</sup> *Peters' Administrator v. Craig*, 6 Dana, 307.

<sup>4</sup> *Sutton v. Tyrrell*, 10 Vt. 91.



been held to work a revocation.<sup>1</sup> Though it must be confessed that, especially if the neglect be that of one party only, this rule would seem often to be contrary to the spirit as well as to the letter of the principle by which the revocation is required to be made by an instrument of equal dignity with the submission itself. The difficulty, however, is perhaps of a practical nature; for if a party is bound by his agreement to do some specific act which will put the arbitrators in a position to proceed with the arbitration, and he refuses or neglects to do it, either the courts must compel him to a specific performance, or else the contract between the parties must, by his act, be annulled. For it is impossible that the party not in default should be kept out of his right to have the controversy decided by reason of the dishonesty or laches of his opponent, yet he would be then kept out of this right if the contract of submission were still in force, and yet could not be carried out by reason of such refusal or neglect. It would come, therefore, to this, either there must be an order for specific performance, or there is a revocation. The order it might often be impossible to render effectual, and, moreover, it is against the established policy of the courts to grant specific performance of agreements to submit. Therefore, the revocation seems to follow as an inevitable practical necessity.

But the neglect of the party must prevent the performance of some act which is an indispensable preliminary to the power of the arbitrators to proceed with the hearing and determination of the controversy. Non-performance of a proper and customary, but not strictly essential, act would not have this effect.

Thus, a party by failing to attend at a meeting, of which he has had due notice, cannot revoke the authority of the arbitrators. They may proceed *ex parte*. "The law has not contemplated" that revocation "could be so done."<sup>2</sup>

<sup>1</sup> Allen v. Galpin, 9 Barb. 246.

<sup>2</sup> Brown v. Leavitt, 26 Maine, 251; Bray v. English, 1 Conn. 498.

**Revocation through the Instrumentality of a Stranger.** — Revocation may sometimes come from a source wholly external to the submission. Thus a Vermont statute authorizes a reference of a disputed claim between an administrator or executor and the supposed creditor or debtor of the estate, upon written consent of parties, and an order from the Probate Court. Held, that a person, not being a party, may apply to the Probate Court to set aside and annul such reference, while it is still pending; and that upon proof of collusion or of facts, which might render further proceedings before the referees fraudulent and injurious to the rights of any person interested in the particular claim or in the estate, it would be the duty of the court to revoke the reference.<sup>1</sup>

**Revocation by Congress.** — If Congress, by resolution, sends a claim to be awarded upon by the head of one of the executive departments, and his award is invalid, by reason of excess of authority, Congress may revoke his power, by repealing the resolution of appointment.<sup>2</sup>

**Revocation by an Agent.** — Revocation may, of course, be made through the intervention of an agent as well as by the party himself. But the agent must be actually authorized to revoke. His power to revoke is not included in, and cannot be inferred from, his power to enter into the submission on behalf of his principal.<sup>3</sup>

**Damages may be claimed for Revocation.** — It is clear that if either party revokes the authority of the arbitrators, without the assent of the other party, or without sufficient justification moving from the other party, he has broken his undertaking contained in the submission. For this, in like manner, as for any other breach of contract, he is liable to be held to respond in damages.<sup>4</sup>

<sup>1</sup> *Lathrop v. Hitchcock*, 38 Vt. 496.

<sup>2</sup> *De Groot v. United States*, 5 Wall. 419.

<sup>3</sup> *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

<sup>4</sup> *Brown v. Leavitt*, 26 Maine, 251; *Dexter v. Young*, 40 N. H. 130; *Frets v. Frets*, 1 Cow. 335.

The phraseology of the bond will not be nicely construed in order to save the revoking party from this proper consequence of his own act. Thus, if the bond does not bind him in precise terms to "submit," but only to perform or keep the award, his revocation will still be a breach of the condition and a forfeiture of the bond, since, by his own act, he has deprived himself of the power to fulfil the condition of the bond.<sup>1</sup>

**The Measure of Damages.**—The rule as to the measure of damages has been laid down to be, that the revoking party must pay all damages which the other party has sustained. These, it has been said, "would of course *include*" the costs of a suit discontinued by reason of the submission, and the cost and expenses incurred by the other party in preparing for the trial before the arbitrators.<sup>2</sup> The damages sought to be recovered in the discontinued actions cannot be included in the damages, at least, as it would seem, unless the claimant has in some way lost his power to recover in a fresh suit.<sup>3</sup>

Where the submission has been entered into by bond, the revocation is a breach of the condition of the bond.<sup>4</sup> But if the bond names a penalty, without expressly declaring it to be stipulated or liquidated damages, though the one party revoke, yet the other is not, therefore, entitled to judgment for the full sum named in the bond. He must show his actual damages.<sup>5</sup>

**Pleading Revocation.**—In an action for the forfeiture of the bond, on the ground of revocation, the plaintiff should assign for breach the revocation itself, and not the non-performance of the award.<sup>6</sup>

<sup>1</sup> *Town of Craftsbury v. Hill*, 28 Vt. 763; *Aspinwall v. Tousey*, 2 Tyler, (Vt.) 328; *Warburton v. Storr*, 4 Barn. & Cr. 103; *Vynior's Case*, 8 Coke, 162.

<sup>2</sup> *Hawley v. Hodge*, 7 Vt. 237; *Rowley v. Young*, 3 Day, 118.

<sup>3</sup> *Blaisdell v. Blaisdell*, 14 N. H. 78.

<sup>4</sup> *Brown v. Leavitt*, 26 Maine, 251.

<sup>5</sup> *Blaisdell v. Blaisdell*, 14 N. H. 78.

<sup>6</sup> *Frets v. Frets*, 1 Cow. 335.

. **Effect of Submission ceasing to Bind a Party.**—If the submission and award for any cause cease to be binding upon one of the parties thereto, it also ceases to be binding upon all the rest. For the assent of all, and the fact that all are to be bound alike, is of the essence of the consideration.<sup>1</sup>

<sup>1</sup> *Power v. Power*, 7 Watts, 205.

## CHAPTER VIII.

### THE UMPIRE.

The functions of umpire and of third arbitrator distinguished.

Appointment — 1. How to be made.

2. When may be made.

Effect of appointment of umpire on power of arbitrators.

Whence arbitrators derive power to appoint an umpire.

They may make several nominations.

Parol appointments.

Evidence of umpire's authority.

Umpire's duty as to re-hearing parties.

Construction of a submission.

#### **The Functions of Umpire and of Third Arbitrator distinguished.**

— An umpire is a person whom two or more arbitrators, under authority of the parties to the submission, select. His function is to decide the controversy which the arbitrators have been unable to decide. He is not to act in conjunction with them,<sup>1</sup> but as a substitute for them. He is, as it were, a sole arbitrator, with the same duty of hearing the whole case *de novo* as would have devolved upon him had he been originally appointed alone.<sup>1</sup> Though this duty may, of course, be waived by consent of parties. Neither of the arbitrators need join with him in his award. If they do so, it will not, however, avoid the award, but their joinder will be rejected as surplusage.<sup>2</sup> It is evident, therefore, that an umpire is to be distinguished from a third arbitrator, since his powers and duties are widely different.<sup>3</sup> A third arbitrator, when only called in, is simply an

<sup>1</sup> *Haven v. Winnisimmet Co.*, 11 Allen, 377; *Shields v. Renno*, 1 Overt. 313; *Bassett's Adm'r v. Cunningham's Adm'r*, 9 Gratt. 684.

<sup>2</sup> *Haven v. Winnisimmet Co.*, 11 Allen, 377; *Mullins v. Arnold*, 4 Sneed, 262; *Rison v. Berry*, 4 Rand. 275; *King v. Cook*, Charl't. 286; *Boyer v. Amand*, 2 Watts, 74; *Butler v. Mayor, &c.*, of New York, 1 Hill, 489; *Rigden v. Martin*, 6 Har. & J. 403.

<sup>3</sup> *Haven v. Winnisimmet Co. supra*; *Lyon v. Blossom*, 4 Duer, 318.

addition to the number of the original board, and all together constitute a new board. The customary proviso, where a third arbitrator is desired, that after such third party shall have been named, the award of a majority shall be final, shows that such supernumerary is to act with his fellows, originally nominated, in hearing and deciding the controversy. And this, too, although he be erroneously called "an umpire."<sup>1</sup> The award must then express the finding of, and be executed by at least a majority of, the new board.<sup>2</sup>

In neither case is the person called in, whether as umpire or third arbitrator, justified in considering only the differing opinions of the two original arbitrators, and selecting for his concurrence that which seems to him to be nearer to correctness. He must exercise his individual and independent judgment, for the purpose of making up an award which he considers proper.<sup>3</sup> He must consider the whole case, and not merely the points on which the arbitrators have been unable to agree.<sup>4</sup> But he may, if he chooses, accept and adopt as his own their report upon the points wherein they have agreed, and by incorporating it with his own findings on the other points, his award thus made up upon the whole will be good.<sup>5</sup>

The power to two arbitrators, in case of disagreement, to choose a third person as arbitrator, has been construed to be a power to choose an umpire.<sup>6</sup>

If two arbitrators, mistaking the directions of the submission, appoint an umpire instead of a third arbitrator, a party who has attended the meetings before the umpire, without objection, will not be allowed to impeach the award on this ground.<sup>7</sup>

**Appointment — 1. How to be made.** — The appointment of the

<sup>1</sup> *Mullins v. Arnold*, 4 Sneed, 262.

<sup>2</sup> *Haven v. Winnisimmet Co.*, 11 Allen, 377.

<sup>3</sup> *Haven v. Winnisimmet Co.*, 11 Allen, 377; *Tollit v. Saunders*, 9 Price, 612.

<sup>4</sup> *Crabtree v. Green*, 8 Geo. 8.

<sup>5</sup> *Executors of Finney v. Miller*, 1 Bailey, 81.

<sup>6</sup> *Scudder v. Johnson*, 5 Mis. 551.

<sup>7</sup> *Graham v. Graham*, 12 Penn. St. 128.

umpire must be made by the agreement of the arbitrators upon a particular person. If the selection be left to be determined by a chance, it will be void.<sup>1</sup> Though where each arbitrator names a person, to whom the other cannot object, and they toss up to decide between the two nominees, this will be a valid arrangement.<sup>2</sup>

It is said, however, that though an umpire may not be chosen by lot, yet a choice by lot will be sustained if the parties have proceeded with the hearings before him, after having knowledge of the manner of selection.<sup>3</sup>

**2. When may be made.**— Where two arbitrators are named, with power to choose an umpire, they may make their choice before they have heard or considered the evidence or disagreed between themselves, and while it yet remains uncertain whether they will be able to agree or not. Indeed it has often been remarked that this is the fairest manner in which to make the choice.<sup>4</sup> So also where the choice is to be of a “third referee.”<sup>5</sup> The same rule was laid down by Kent, C. J., where the submission was to A. and B., so that they should make their award on or before a day certain, and if they should not, then to such umpire as they should choose.<sup>6</sup> So where the language is, “with power in case of disagreement to choose an umpire.”<sup>7</sup> In case of such choice, it seems that the umpire may sit with the arbitrators, and hear and consult in conjunction with them.<sup>8</sup>

<sup>1</sup> *In re Cassell*, 9 Barn. & Cr. 624; *Ford v. Jones*, 3 B. & Ad. 248; *In re Greenwood & Titterington*, 9 Ad. & El. 699; *Hodson v. Drewry*, 7 Dowl. 569.

<sup>2</sup> *Neale v. Ledger*, 16 East, 51; *Morgan v. Bolt*, 1 N. R. 271; *European and American Steam Shipping Co. v. Croskey*, 8 C. B. N. s. 397.

<sup>3</sup> *Graham v. Graham*, 12 Penn. St. 128.

<sup>4</sup> *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Butler v. Mayor, &c., of New York*, 1 Hill, 489; *Van Cortlandt v. Underhill*, 17 Johns. 405; *Rigden v. Martin*, 6 Har. & J. 403; *Bates v. Cooke*, 9 Barn. & Cr. 407; *Harding v. Watts*, 15 East, 556.

<sup>5</sup> *Bigelow v. Maynard*, 4 Cush. 317.

<sup>6</sup> *M'Kinstry v. Solomons*, 2 Johns. 57.

<sup>7</sup> *Peck v. Wakely*, 2 M'Cord, 279.

<sup>8</sup> *Butler v. Mayor, &c., of New York*, 1 Hill, 489; *Bassett's Adm'r v. Cunningham's Adm'r*, 9 Gratt. 684.

But if a time be limited within which the arbitrators are to make their award, and, in case of their disagreement, a later day is named on or before which the umpire must award, they may name the umpire after the time for returning their own award has expired. "For the power of appointing an umpire is quite collateral to that of making an award, and survives when the latter power is extinct."<sup>1</sup>

The English rule is well established, that arbitrators need not wait until the time limited for them to award is actually expiring. So soon as it becomes evident that they will not agree, they may name an umpire and send the matter to him.<sup>2</sup>

And so also is the rule in the United States, where it has been held that if the submission gives the arbitrators a certain time within which to make their award, and they, finding themselves unable to agree, choose an umpire, according to a power given in the submission in case of disagreement, who renders his award before this time has elapsed, his award will be good. The arbitrators are not bound to await the expiration of the time allowed them before proceeding to a choice.<sup>3</sup>

**Effect of Appointment of Umpire on Power of Arbitrators.** — What effect is produced upon the power of the arbitrators by their appointment of an umpire, the time allowed them to award not having expired, is a question not satisfactorily settled by any authority which I have found. It might be naturally imagined that by such an appointment they would divest themselves, immediately, by this act of their own, of their own authority to award. Yet the only adjudication in which the matter has been discussed at all, contains a contrary intimation, to the effect that even after the arbitrators have disagreed

<sup>1</sup> Russell on Arb., 3d ed. p. 218; citing *Harding v. Watts*, 15 East, 556; *Burdett v. Harris*, 3 Keb. 387; *Adams v. Adams*, 2 Mod. 169; *Winteringham v. Robertson*, 27 L. J. Exch. 301.

<sup>2</sup> *Roe d. Wood v. Doe*, 2 Term, 644; *Harding v. Watts*, 15 East, 556; *Cowel v. Waller*, 2 Barnard. 154; *Elliott v. Cheval*, 1 Lutw. 541; *Coppin v. Hurnard*, 2 Saund. 133 (a) note; *Jennings v. Vandeputt*, Cro. Car. 263.

<sup>3</sup> *Richards v. Brockenbrough's Adm'r*, 1 Rand. 449.



and nominated an umpire, yet their authority is not thereby necessarily concluded; and if they can afterward agree, they can award at any time before he has awarded.<sup>1</sup> But they cannot return his award as their own, if they still continue to disagree as to its propriety.<sup>2</sup>

**Whence Arbitrators derive Power to appoint Umpire.** — Arbitrators have no inherent power to call in an umpire. They must be in terms authorized so to do by the submission. An umpire called in by them, without specific authority, would be endowed with no power whatsoever in relation to the parties or the subject-matter of the controversy; and his award would be a mere nullity.<sup>3</sup>

But it may be shown by parol that after a submission in writing the parties agreed that the arbitrators might call in an umpire; and it may also be shown that a written submission to "the arbitrators now about to sit," was intended to confer upon them this power.<sup>4</sup>

If the arbitrators are authorized to appoint an umpire, the consent of the parties is not necessary to render valid their selection.<sup>5</sup>

**They may make several Nominations.** — The power of arbitrators to name an umpire is not necessarily exhausted by a single nomination. If the nominee refuse to accept, or neglect to act, successive nominations may be made, until some one is found who will actually exercise the function. The authority is determined only when it has been *fully* executed.<sup>6</sup>

**Parol Appointments.** — Where the submission may be by parol, the appointment of an umpire may also be by parol. But where the submission is to be made a rule of court, the appointment should be in writing, so that the authority of the

<sup>1</sup> Daniel v. Daniel, 6 Dana, 93.

<sup>2</sup> Ibid.

<sup>3</sup> Daniel v. Daniel's Adm'r, 6 Dana, 98; Sharp v. Lipsey, 2 Bailey, 113.

<sup>4</sup> Sharp v. Lipsey, 2 Bailey, 113.

<sup>5</sup> Ibid.

<sup>6</sup> Cloud v. Sledge, 1 Bailey, 105.

umpire may appear on the face of the record.<sup>1</sup> But if the parties acquiesce in the choice of an umpire made by the arbitrators, by proceeding before him and submitting the questions to him, or to him in conjunction with the arbitrators, it will be too late for either of them afterwards to object to the choice as not having been made with due formality.<sup>2</sup>

**Evidence of Umpire's Authority.** — When there is no specific time named in the submission for the appointment of the umpire, *semble* that, if the award recites the fact of the appointment, and is signed by all the arbitrators and the umpire, it will be sufficient evidence of his authority. But not so, if it be signed only by himself.<sup>3</sup> And not so when the submission in terms requires the umpire to be appointed previous to entering upon the reference.<sup>4</sup> In Virginia it has been held that where the award does not recite the choice of the umpire, it may yet be proved by extrinsic evidence that the party apparently signing the award in that capacity was in fact so chosen.<sup>5</sup>

**Umpire's Duty as to re-hearing Parties.** — The question as to the duty of an umpire to re-hear a cause, was said by Judge Waite, in 1845, "to be not very well settled."<sup>6</sup> It remains to-day in substantially the same dubious condition. If there is no dispute about the facts, but the arbitrators differ only in the conclusions to be drawn from them, it would seem sufficient if they lay before the umpire the claims and evidence. In this especial case the umpire was rather a third arbitrator than an umpire, strictly so called; he was called in to act in conjunction with the arbitrators, concerning certain specific points in which, as it turned out, they differed. The court held that a party to the submission was not entitled to have the award set aside because there had been no re-hearing; for that if he had

<sup>1</sup> *Elmendorf v. Harris*, 23 Wend. 628.

<sup>2</sup> *Knowlton v. Homer*, 30 Maine, 552.

<sup>3</sup> *Elmendorf v. Harris*, 23 Wend. 628.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Rison v. Berry*, 4 Rand. 275.

<sup>6</sup> *Ranney v. Edwards*, 17 Conn. 309.

wished a re-hearing in the event of the third arbitrator being called in, he should have said so at the time the case was submitted.

The same judge declares and indorses the English rule, to wit: That if a party knows of the disagreement and the calling in of an umpire, and does not thereupon demand a re-hearing, he will lose his right to it, and will be concluded from afterwards objecting that it did not take place.<sup>1</sup> But if either party demands a re-hearing he should have it.<sup>2</sup>

Russell, however, lays down the English rule as follows: "He [the umpire] must examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course."<sup>3</sup> But the objection to his proceeding without a re-hearing may be waived.<sup>4</sup>

In Pennsylvania, in two old cases, it was held that the umpire ought to re-hear the cause.<sup>5</sup> The case of *Daniel v. Daniel*<sup>6</sup> (Kentucky) says that these cases follow the older rule in England, which, however, has since been modified to the shape above expressed. But it cannot be doubted that if a party requests the umpire to hear him and examine his witnesses, he is entitled to have his request granted. Whence it follows

<sup>1</sup> *Ranney v. Edwards*, 17 Conn. 309; citing *Tunno v. Bird*, 5 B. & Ad. 488; and see *Sharp v. Lipsey*, 2 Bailey, 118; *Knowlton v. Homer*, 30 Maine, 552; *Graham v. Graham*, 9 Barr, 254, in which the same rule is substantially adopted.

<sup>2</sup> *Ranney v. Edwards*, 17 Conn. 309; citing *Salkeld v. Slater*, 12 Ad. & E. 767; in which case there was conflicting testimony, but no new testimony was proposed to be offered before the umpire.

<sup>3</sup> Russell on Arb., 3d ed. p. 230; *Salkeld v. Slater*, 12 Ad. & E. 767; *In re Jenkins*, 1 Dowl. N. S. 276; *Waltonshaw v. Marshall*, 1 H. & W. 209; *Watson v. Trower*, Ryl. & M. 17.

<sup>4</sup> *Salkeld v. Slater*, and *In re Jenkins*, *supra*.

<sup>5</sup> *Falconer v. Montgomery*, 4 Dall. 232; *Passmore v. Pettit*, ib. 271.

<sup>6</sup> 6 Dana, 93.

that he is entitled to such notice of the time and place, when and where the umpire will act, as will enable him to prefer this request if he wishes to.

**Construction of a Submission.**—A submission to two and their umpire requires that an umpire be summoned only in case of disagreement; an award by the two is good.<sup>1</sup>

<sup>1</sup> Keans v. Rankin, 2 Bibb, 88.

## PART III.

.. THE AWARD.



## CHAPTER IX.

### THE FORMALITIES AND CONTENTS OF THE AWARD.

No especial form, if a decision be expressed.

The fact of decision need not be declared.

Decision by implication.

Oral awards.

Stipulations for a written award.

Award concerning real estate.

Award concerning boundary lines.

Attesting witness.

Seal.

Instructions of submission must be followed.

Stipulations construed as conditions precedent.

Award under statute must comply with the statute.

But may be upheld if it does not so comply.

Strict compliance may be waived.

Award may be of a sum in gross.

Or may be of each item separately.

What the award must contain.

Award need not order release nor discontinuance.

Award of a nonsuit.

Some peculiar forms of awards by means of promissory notes.

Professional assistance in drawing award.

Recitals of the submission and proceedings in the award.

Erroneous recitals.

Referee need not report evidence.

Stipulations for delivery of the award.

Delivery must be of the original award.

Delivery in duplicate.

Waiver of actual delivery.

To whom delivery is to be made.

What constitutes delivery.

Delivery of an oral award.

Pleading delivery.

How non-delivery is to be availed of.

Publication of the award.

Possession of award.

Neither party is bound to notify the other of the award.

**No especial Form, if a Decision be Expressed.** — If the submission prescribes no formalities to be observed in the execution

of the award, the arbitrator may put it in such shape as he chooses. No especial formula need be observed, and no technical characteristics are necessary to the validity of the instrument.<sup>1</sup> Any language which expresses an *actual decision* is sufficient. For example, the words, "I am of opinion that," &c., are good.<sup>2</sup> But where the arbitrator wrote a letter to the parties, saying, "To meet the circumstances of the case in a liberal manner, I propose that B. should pay A.," &c., it was held that this was no award.<sup>3</sup>

An award of the arbitrator, in which he states that he has made an examination, and "*finds*" the cost of certain labor at a certain amount, is a sufficiently decisive expression of his determination in the matter.<sup>4</sup>

The parties to a submission agreed to be bound by the opinion of a professional man upon the construction of an act of Parliament. He gave an opinion, in which he recommended that the printed statute should be compared with the parliamentary roll before the parties should finally settle the matter; for he conceived it possible that a discrepancy or error in the printed statute might be found to exist. His opinion, however, was not couched in any conditional or dubious form, but was a decisive and absolute expression of his determination concerning the construction. For this reason it was held to be a final and binding award.<sup>5</sup>

Words not in themselves absolutely imperative will sometimes be construed as such in order to bring an award, which obviously ought to be sustained, within the foregoing rule. Thus an award in which a balance is found in favor of one party, and the other party is "requested" to pay it, is good, since the request will be construed as equivalent to an order.<sup>6</sup>

<sup>1</sup> Ott v. Schroepel, 5 N. Y. (1 Seld.) 483.

<sup>2</sup> Matson v. Trower, Ryl. & M. 17; Price v. Hollis, 1 M. & S. 105; Eardley v. Steer, 4 Dowl. 423.

<sup>3</sup> Lock v. Vulliamy, 2 N. & M. 336; 5 B. & Ad. 600.

<sup>4</sup> Whitehead v. Tattersall, 1 Ad. & El. 491.

<sup>5</sup> Price v. Hollis, 1 M. & S. 105.

<sup>6</sup> Smith v. Hartley, 10 C. B. 800.



The *finding* would constitute an award, and, strictly speaking, after the amount of an indebtedness has been determined, an order for its payment would seem to be matter of supererogation. Wherefore it would appear reasonable in the foregoing case to have upheld the award without regarding it as necessary to construe the request into a command.

**The fact of Decision need not be Declared.** — It is not necessary that arbitrators should expressly declare, in an award, that they have decided the matters submitted to them. It is sufficient if the fact appear from the contents of the award.

Thus a bond of arbitration recited that differences were pending between A. and B. "concerning the matter that the said B. demands of the said A. possession of certain tracts of land," which were then described, "which the said B. alleges the said A. has, without law, entered upon and disseised the said B., and still withholds the possession thereof from him." The award recited that the parties had been heard, and their proofs and arguments duly considered, and the arbitrators awarded and determined "that the 'north line,' so called, between said A. and B., shall be the line established," &c., describing the line. A bill for specific performance was demurred to on this ground, among others, that the award did not exhaust the matter submitted, since it did not determine whether a trespass had been committed, whether there was a wrongful withholding, or whether damages should be paid. But the court said that the boundary line was clearly the matter in dispute; this had been determined, and "the award, in the opinion of the court, decides the matters submitted to the arbitrators, and is final and complete."<sup>1</sup>

**Decision by Implication.** — As will be seen hereafter, in the discussion of the topic of Certainty in the Award, the decision of the arbitrators may sometimes be derivable only through implication. But implication will take the place of an express statement only when it is obvious and unavoidable. The in-

<sup>1</sup> Caldwell v. Dickinson, 13 Gray, 365.

stances are chiefly furnished by reports of referees, rendered in pending causes, awarding costs to one of the parties, and giving no further directions by way of determining the matters in difference. In such cases it has been held that the award of costs was equivalent to a finding in favor of the same party upon the point in controversy.<sup>1</sup>

An action on the case to recover damages for the diversion and obstruction of a water-course was referred by rule of court. The award was: "We, &c., having heard the parties and their several allegations and proofs, do award and determine, and this is our final award and determination, that the defendant shall pay to the plaintiff the sum of ten dollars, without costs, either before the referees or the court, — that is, each party is to pay his own costs; the above sum of ten dollars being given to the plaintiff as the defendant's share of the referees' fees." The court said: "The award was, that each party should pay his own costs, and that the defendants should pay to the plaintiff a part of the fees of the referees. If not, they looked to him for their fees, and discharged the defendant from any claim therefor on him. And the necessary implication from the award is, as it was in *Buckland v. Conway*, that the referees determined the question submitted to them in the defendant's favor. The legal presumption is, that they could not have made this award without having decided that the plaintiff had not maintained the action submitted to their determination."<sup>2</sup> The same principle, it was said, was applied in this case which the court was wont to apply in verdicts.<sup>3</sup>

The old case of *Inhabitants of Buckland v. Inhabitants of Conway*, relied upon as a controlling precedent in the foregoing adjudication, was as follows: A pauper cause between the two towns was submitted. The award was only that the

<sup>1</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray, 418; *Rixford v. Nye*, 20 Vt. 132; *Lamphire v. Cowan*, 39 Vt. 420; *Hartnell v. Hill, Forrest*, 73.

<sup>2</sup> *Stickles v. Arnold*, 1 Gray, 418.

<sup>3</sup> *Hodges v. Raymond*, 9 Mass. 316; *Hawks v. Crofton*, 2 Bur. 698.

defendants should recover against the plaintiffs the costs of the reference and the costs of court. The court, per Parker, C. J., said: "As to the validity of the report in reference to the objection that it does not adjudicate upon the subject-matter submitted to the referees, we think it sufficient, because, by necessary implication, it must be considered as a determination upon the question. They award that the defendant town shall recover the costs of the action. This they could not have done without having decided the point in controversy in their favor. At least, the legal presumption is, that they so determined. The judgment of the court will be, that the plaintiffs take nothing by their writ, and that the defendants recover their costs; and this makes a final determination of the action, which is what was submitted to the referees."<sup>1</sup>

Where title is in dispute, an award which does not in direct terms pass upon or dispose of the title, may yet be upheld if it orders one party to pay to the other the price or value of the property.

A dispute concerning the ownership of certain oxen, sold by A. to B. and claimed by C., and as to who should pay for the same, and who should be entitled to receive the amount, was submitted. The award was, that B. should pay a certain sum to A. and another certain sum to C.; but it contained no specific determination or direction concerning who owned, or who should by virtue of the award become the owner of, the cattle. It was held, however, that the disposition of this point was made sufficiently clear by implication. B. was directed to pay the other two parties, and it was an obvious and necessary presumption that he was to take and hold the oxen; from the payment ordered to be made by him, "it is certainly to be inferred that the ownership of the oxen was adjudged to be in him, and A. and C., having the consideration of the same, have no rights in the oxen themselves."<sup>2</sup>

<sup>1</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396.

<sup>2</sup> *Hanson v. Webber*, 40 Maine, 194.

**Oral Awards.** — The old common law allowed an award to be made orally. Nor has the ancient rule been changed except by express provisions of statutes. The submission, however, may of course call for an award in such shape as the parties may desire, and if it call for a written award, an oral award will be bad. But in the absence of statutory restrictions, or of stipulations in the submission, and except where the right to be disposed of is, by its own nature, capable of being disposed of only by a sealed instrument, a verbal award will be good.<sup>1</sup>

Owing to the uncertainty necessarily attendant upon oral awards, especially where they relate to matters of importance, or where they are to be of continuing effect, the courts are averse to them. An oral award, satisfactorily established, must be sustained; but the judges always speak of these verbal decisions with disapprobation. In the United States it is sometimes said that they may properly follow oral submissions.<sup>2</sup> From which remark might be inferred an inclination to restrict their use to this connection. So says Mr. Kyd, stating that when the submission is in writing the award must be in writing.<sup>3</sup> But he cites no authorities, and the court, in *Marsh v. Packer*,<sup>4</sup> refuse to accept his rule, and, on the strength of English cases, lay down the doctrine, that the manner in which the submission is made has no such connection with the manner in which the award must be made; and a written submission, or even a submission by deed, may be followed by a verbal award.

A purpose or attempt on the part of the arbitrators to put their award in writing, subsequently desisted from, does not

<sup>1</sup> *Philbrick v. Preble*, 18 Maine, 255; *Valentine v. Valentine*, 2 Barb. Chy. 430; *M'Manus v. M'Culloch*, 6 Watts, 357; *Jones v. Dewey*, 17 N. H. 596; *Hanson v. Liversedge*, Carth. 176, and 2 Vent. 242; *Rawling v. Wood*, Barnes, 54; *Bailey v. Lechmere*, 1 Esp. Ca. 377 (*per* Lord Kenyon).

<sup>2</sup> *Valentine v. Valentine*, 2 Barb. Chy. 430; *Cable v. Rogers*, 3 Bulst. 311.

<sup>3</sup> Kyd on Award, 74.

<sup>4</sup> 20 Vt. 198.

invalidate their verbal award, provided that a verbal award is good under the submission.<sup>1</sup>

**Stipulations for a Written Award.**—The stipulation for a written award need not always be made in precise terms. Occasionally it will be a necessary implication, and in this form will be upheld in like manner as if it were couched in plain and unmistakable language. For example, if the submission requires that the award shall be signed by the arbitrators, it is obvious that the parties intend to demand a written award, since no other could be signed. But a mere proviso that an award shall be made and ready for delivery, does not import a proviso for a written award, since a verbal award is as capable of delivery as is one thrown into writing.<sup>2</sup>

In the case cited from Dyer the condition in the arbitration bond was that “the award should be delivered by” a certain day. It was held to be satisfied by an oral award pronounced to the parties.

In *Oates v. Bromil* the submission was by bond, containing a proviso that the award should be ready to be delivered upon a day named. An oral award, ready to be published to the parties on that day, was held sufficient.

**Award concerning Real Estate.**—An award which professes to determine the title to real estate, or dispose of any interest therein, must be in writing.<sup>3</sup> The Statute of Frauds comes in to control this matter. For the award derives all its force and validity from the fact of the agreement of the parties. It is, so to speak, a limb or joint in the agreement. The arbitrators, as has been already shown, are merely the agents of the parties, for determining and bringing into shape the latter part of an agreement, of which the submission constitutes the first part. Consequently not only the submission, but the award which follows it, and which makes a part of the one great whole,

<sup>1</sup> *Jones v. Dewey*, 17 N. H. 596.

<sup>2</sup> *Oates v. Bromil*, 1 Salk. 75, and 6 Mod. 176; *Cocks v. Macclesfield, Dyer*, 218, b; *Blundell v. Brettargh*, 17 Ves. Jr. 232, 240.

<sup>3</sup> *Philbrick v. Preble*, 18 Maine, 255.

must be in writing, in order to be valid under the statute. Substantially so it was said by Redfield, J., in *Smith v. Bullock*,<sup>1</sup> explaining the earlier case of *Akely v. Akely*.<sup>2</sup> "That case was decided mainly upon the ground that a contract by submission and award was to be put upon the same ground as any other contract in the same form,—the arbitrators being but the agents of the parties for carrying into effect the intention of the parties." And in the case of *Akely v. Akely*, the same judge said: "At present, both in this country and in England, an award of arbitrators, in writing and under seal, made in pursuance of a submission under seal, is itself a portion of the contract between the parties, and as much binding in regard to the title of real estate, unless in some way defective, as any other contract under seal, made in the same terms, and signed and sealed by the same parties."

**Award concerning Boundary Lines.**—The only exception to the foregoing rule is furnished by oral awards concerning boundary lines. After the parties have accepted the award, and have actually run the lines according to it, so that the line of division remains a completed and established fact, the award will be regarded as final.<sup>3</sup>

The parties to an arbitration bond submitting a dispute concerning the title to a corner of land, "after this matter had been settled and while the parties were upon the ground, . . . arranged . . . that the same arbitrators should proceed and settle the line between the respective estates" of the parties, "and that the line which should be so settled should be taken to be the boundary, and conclusive upon either party. This was done by the arbitrators, and both parties assisted, and neither of them dissented from the decision." Thus neither the submission nor the award was in writing, but they were upheld as valid and binding upon the parties.<sup>4</sup>

<sup>1</sup> 16 Vt. 592.

<sup>2</sup> 16 Vt. 450.

<sup>3</sup> *Jones v. Dewey*, 17 N. H. 596; *Sawyer v. Fellows*, 6 id. 107.

<sup>4</sup> *Jones v. Dewey*, 17 N. H. 596.

**Attesting Witness.**—There is no necessity, at common law, for an attestation by witnesses.<sup>1</sup> Though Mr. Russell says, “it is customary to have an attesting witness who may prove the execution.”<sup>2</sup>

**Seal.**—A seal is not ordinarily necessary upon an award. Nor is it rendered necessary simply by reason of the submission having been made by a sealed instrument.<sup>3</sup>

**Instructions of Submission must be followed.**—If the submission contain instructions concerning the form, execution, or publication of the award, they must be strictly followed. For, says Mr. Russell, “whenever a special authority is created, those who give it have a right to annex to it their own terms, with which he on whom it is conferred must comply.”<sup>4</sup> Any deviation from these instructions, if in a substantial point, will be fatal to the validity of the decision.<sup>5</sup>

“The parties,” said Cady, J., in *Allen v. Galpin*,<sup>6</sup> “had a perfect right to give to the arbitrators such powers as they pleased, and to dictate the manner in which the award should be made. They might have directed it to be written upon parchment or engraved upon brass, or that the arbitrators should cause it to be printed; and if the arbitrators did not choose to do as they were authorized, their acts would not bind the parties.”

“The authority given by the submission must be pursued.”<sup>7</sup>

“An award owes its force and validity to the agreement of the parties, and is not, of course, binding upon them, unless it

<sup>1</sup> *Valle v. North Missouri R. R. Co.*, 37 Mis. 445; *Hedrick v. Judy*, 23 Ind. 548.

<sup>2</sup> Russell on Arb., 3d ed. p. 235.

<sup>3</sup> *Owen v. Boerum*, 23 Barb. 187. See *post*, “Instructions of Submission must be followed.”

<sup>4</sup> Russell on Arb., 3d ed. p. 234.

<sup>5</sup> *Allen v. Galpin*, 9 Barb. 246. See statement of this case, *post*, pp. 274, 275.

<sup>6</sup> 9 Barb. 246.

<sup>7</sup> *Pratt v. Hackett*, 6 Johns. 14.

has been made in the manner which the agreement has pointed out.”<sup>1</sup>

This rule, however, is so far limited in its application to essentials, that it is not to be extended to frivolous inconsistencies or neglects. The award will not be vacated for matters of sheer insignificance. On the other hand, considerable strictness is shown in determining what are essentials. Generally, however, it may be said that if the parties distinctly agree that a certain specific formality shall be observed in the execution of the award, their express demand must be complied with, or the award will be bad. Thus where a submission concerning the amount of rent to be reserved in a lease required the finding to be indorsed on the lease, an award written on a separate piece of paper, and fastened on to the lease by a wafer, was held, for this defect alone, to be not obligatory on the parties.<sup>2</sup> Though it must be acknowledged that the equities in this especial cause made out a very strong case in favor of the party seeking to impeach the award on the ground of this informality.

If the submission requires the award to be in writing, and under the hands of the arbitrators, each one of these matters will be essential to its validity.<sup>3</sup> But a requirement that an award be “made and published in writing” is satisfied by a written award, without written notice to the parties that it has been made.<sup>4</sup>

A submission concerning a boundary line, to be run by the arbitrators, stipulated for an award to be “made and published in writing under the hands of” the arbitrators on or before a certain day. The arbitrators heard the parties, decided upon their respective rights, and made, signed, and sealed an instrument intended to be their award. The arbitrators then met

<sup>1</sup> *Tudor v. Scovell*, 20 N. H. 174 (*per* Gilchrist, C. J.).

<sup>2</sup> *Montague v. Smith*, 18 Mass. 396.

<sup>3</sup> *Everard v. Paterson*, 6 Taunt. 625; *Thompson v. Mitchell*, 35 Maine, 281.

<sup>4</sup> *Thompson v. Mitchell*, 35 Maine, 281.



the parties, read this paper to them, and delivered to each of them a written and signed copy. But at the same time the chairman explained that they were doubtful whether the paper expressed correctly what they had in fact decided; he then stated verbally what their decision actually was, and that if the written award did not accurately express it, the instrument would be amended when the mistake should be ascertained by an inquiry from the surveyor. Afterward the chairman learned from the surveyor that the award did not correctly set forth the decision, and he amended the sealed copy, which he had retained, and made it conform to the decision, according to his statement to the parties. But, after this alteration, the document was not again presented to the other arbitrators, and no notification was given to the parties. The court said that upon no just ground could this award be considered to have been made in writing, under the hands of the arbitrators, and to have been published by them. The real award and decision had been published to the parties orally, and this instrument, which conformed to the award orally published, differed in an essential particular from the only written award which had been published. "The foundation of the defendant's agreement to perform an award published in writing was never laid; the condition of it was never performed." His agreement was not to do whatever the arbitrators might decide, "but to do what they should make obligatory upon him, by a decision made and promulgated in a manner expressly stipulated." The stipulation not having been complied with, the obligation did not attach.<sup>1</sup>

If the submission calls for an award under seal, an award in writing, but not under seal, is bad.<sup>2</sup>

If a time be named within which the award is to be made, it is invalid if it be not made until after that time has elapsed.<sup>3</sup>

<sup>1</sup> *Caldwell v. Dickinson*, 13 Gray, 365.

<sup>2</sup> *Stanton v. Henry*, 11 Johns. 133; *Henderson v. Williamson*, 1 Strange, 116; *Thaire v. Thaire*, Palm. 109; 2 Rolle's Rep. 243; *Sallours v. Girling*, Cro. Jac. 278, note a.

<sup>3</sup> *Brown v. Copp*, 5 N. H. 223.

So also a stipulation concerning the time of publication must be strictly complied with.<sup>1</sup>

If the submission requires that there be a subscribing witness to the award, the failure to have such witness will be fatal ; neither can it be cured after the award has been delivered to the parties, even though the time allowed for making it has not expired.<sup>2</sup>

Where the submission requires the signatures of the arbitrators upon the award to be witnessed ; if the signatures of two are witnessed, and that of the third is not, the execution will be held sufficient, *provided* that the award of two would be binding. For then the signature of the third may be rejected as surplusage.<sup>3</sup>

In Iowa it has been held that though the submission in a *lis pendens*, and also a statute under which the submission was entered into, both required the award to be "inclosed and sealed, and transmitted to the court," yet a neglect of these formalities would not be fatal if the award was in fact handed by one of the arbitrators to the clerk of the court, and by this means all possibility of unfairness was disproved.<sup>4</sup> For the obvious purpose of these requirements would have been by this means thoroughly secured. But the doctrine upon which this ruling is based is dangerous, though in this specific cause it perhaps seemed just. Complete uncertainty would be introduced if it should once become established that a distinct statutory order might be dispensed with, if by some other means the apparent purpose of that order was satisfactorily effected.

In England, a requisition that the award should be not only written and sealed, but also indented, was considered, in an old case, to be sufficient to render an award, written and sealed

<sup>1</sup> Pratt v. Hackett, 6 Johns. 14.

<sup>2</sup> Bloomer v. Sherman, 5 Paige, 575 ; Buck v. Wadsworth, 1 Hill, 321 ; Pratt v. Hackett, 6 Johns. 14.

<sup>3</sup> Ott v. Schroepfel, 1 Seld. 482.

<sup>4</sup> Higgins v. Kinneady, 20 Iowa, 474.

but not indented, void.<sup>1</sup> This opinion has, however, been since overruled,<sup>2</sup> or, as Mr. Russell says, has "been scouted by the court."<sup>3</sup>

**Stipulations construed as Conditions Precedent.**—A submission *in pais*, stipulating that the award shall be returned into court, and that judgment shall be entered and execution be issued thereupon, may be so phrased that this provision shall be a conditional clause, or it may be so phrased that it shall be only a distinct and independent stipulation.

A case of this description arose in Massachusetts, upon an agreement to extend time, as follows: "It is further agreed by the parties that the report of referees shall be deemed and taken to have been made in due season, if made at and during the session of the Court of Common Pleas, to be holden at said B., on the first Tuesday of April next, it being agreed that the award be made to said court, judgment to be entered and execution to issue accordingly." It was held (*per* Shaw, C. J.) that, admitting the clause in this instance to be conditional, though it was doubted whether it was properly so, it was at least "plainly a condition subsequent, and did not impair, limit, or suspend the authority of the arbitrators." Neither did it begin to operate until they had "finished their duties." The award, once made, became binding without the adjudication of the court, unless such adjudication was required by the clause in question. But inasmuch as the court could possibly "have no jurisdiction, and could render no effectual judgment," and the return of the award to the court "would, therefore, have been a useless or idle act," it followed that the neglect to make such return was matter of no account, and did not invalidate the award.<sup>4</sup>

**Award under Statute must Comply with the Statute.**—An award in a statutory arbitration should strictly conform to the

<sup>1</sup> *Hinton v. Cray*, 3 Keb. 512.

<sup>2</sup> *Gatliffe v. Dunn*, Barnes, 55.

<sup>3</sup> Russell on Arb., 3d ed. p. 235.

<sup>4</sup> *Foster v. Durant*, 2 Cush. 544.

statutory requirements. If it fails to do so, it may be void altogether, and certainly it cannot be sustained as a statutory award.<sup>1</sup>

**But may be Upheld if it does not so Comply.** — Yet an award in a statutory arbitration, intended to be statutory, and which should therefore comply strictly with all the requisitions of the statute, may sometimes be upheld, although it fails of such compliance. To this end it must appear that the upholding would be in furtherance rather than in contravention of the will and intent of the parties.<sup>2</sup> And also that the purpose which the statute sought to secure by means of the neglected requirements has been, by some other means, amply satisfied.<sup>3</sup>

A statute provided certain specific proceedings to be had for the enforcement of awards following submissions made under it, but expressly declared that nothing contained in it should impair or affect any action upon an award, or upon any bond or other engagement to abide by an award. An arbitration was had which was intended to be statutory. But the award was not attested by a subscribing witness, though this formality was required by the statute. The court held that the award should be upheld as an award at common law, though it was clearly not a basis for the peculiar proceedings given by the statute.<sup>4</sup>

**Strict Compliance may be Waived.** — Strict compliance with the stipulations of the submission may, however, be waived by the parties by their subsequent conduct.<sup>5</sup>

Whether or not strict compliance with statutory requirements could be waived by the parties, without having the effect of transmuting their arbitration, intended to be under the statute, into a proceeding *in pais*, must be regarded as at best doubt-

<sup>1</sup> *Darling v. Darling*, 16 Wis. 644; *Steel v. Steel*, 1 Nev. 27.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Higgins v. Kinneady*, 20 Iowa, 474; cited *ante*, under "Instructions of Submission must be followed."

<sup>4</sup> *Darling v. Darling*, 16 Wis. 644.

<sup>5</sup> *Sellick v. Addams*, 15 Johns. 197; *Perkins v. Wing*, 10 Johns. 143; *Tudor v. Scovell*, 20 N. H. 174. See under the head of "Waiver," and *post* under "Delivery."

ful. No case decides the point generally; but those which bear upon the question of whether or not a statutory requirement that arbitrators shall be sworn can be waived by the parties, are in point so far as they go.<sup>1</sup>

**Award may be of a Sum in Gross.**—Where many different items of account, or separate demands for money, are presented, or where there are counter-claims for money, the arbitrators need not, as a general rule, pass upon them separately. Their award of a gross sum due from one party to the other will suffice.<sup>2</sup>

Under a general submission of all demands, an award of a certain sum of money as being due from one party to the other, without further specifications or orders, will be sufficient.<sup>3</sup>

Though if the submission distinctly requires a separate finding of the amount due by each to the other, it must of course be complied with; and an award of a gross sum in the nature of a stricken balance due by one only, will be bad.<sup>4</sup>

**Or may be of each Item separately.**—There can, however, never be any objection to passing upon each item or claim separately, provided the arbitrators see fit to be at the trouble of doing so. And it has been held that an award which passed upon each claim separately, and then neglected to strike any balance, was nevertheless perfectly good. The action was debt on the bond, by which the defendant bound himself to pay the plaintiff the amount of the award. In five matters the findings were for the plaintiff, in two they were for the defendant. The court, *per* Redfield, C. J., said: "If the arbitrators made a separate award upon each matter submitted, without stating the final balance, giving to each party the balance coming in his favor, we do not think this such a departure from the sub-

<sup>1</sup> See Part II., Chap. IV., "Administration of Oath to Arbitrator."

<sup>2</sup> *Strong v. Strong*, 9 Cush. 560; *Shirley v. Shattuck*, 4 id. 470; *Bigelow v. Maynard*, ib. 317; *Lamphire v. Cowan*, 39 Vt. 420.

<sup>3</sup> *Shirley v. Shattuck*, 4 Cush. 470; *Strong v. Strong*, 9 id. 560; *Spofford v. Spofford*, 10 N. H. 254.

<sup>4</sup> *Houston v. Pollard*, 9 Metc. (Mass.) 164.

mission as to be fatal to the award. If the defendant had withheld his portion of the award, it might have been proper enough for the plaintiff to have judgment on that portion in his favor. But as this judgment is for the final balance, there can be no possible objection to it on that ground.”<sup>1</sup>

**What the Award must Contain.** — The award must, of course, contain that actual decision of the arbitrators which is the result of their consideration of the various matters discussed before them. But it need contain nothing else. The means by which they have come to this conclusion, the reasoning or principles on which they base it, are needless and superfluous.<sup>2</sup> Not only this, these may often work positive mischief, by inducing the losing party to contest the award on the ground that the principles are false, or the deductions incorrect, and may thus tend to promote that very delay and litigation which it was the chief purpose of the arrangement for arbitration to avoid. But the insertion of such matter in the award does not affect its validity. It “is not exceeding the terms of the submission ;” and the “only effect that it can have upon the award is to furnish the means of testing its accuracy.”<sup>3</sup>

It was said by the court in Vermont, that “the fact that the arbitrators have stated results, without the processes which led to them, does not make the award uncertain. To make the award invalid, it must be the decision which is left uncertain, not the reasoning which led to the decision.” So where the affairs of a partnership were to be settled, it was held that the amounts claimed by the several partners, the respective accounts of the parties, and the findings upon these, need not be stated. But an award, finding only that a certain sum was due from one partner to the other, and giving directions concerning the pay-

<sup>1</sup> *Kendrick v. Tarbell*, 26 Vt. 416. And see *Carnochan v. Christie*, 1 Wheat. 446.

<sup>2</sup> *Patterson v. Baird*, 7 Ired. Eq. 255 ; *Blossom v. Van Amringe*, 63 N. C. 65 ; *Lamphire v. Cowan*, 39 Vt. 420.

<sup>3</sup> *Stewart v. Cass*, 16 Vt. 663.

ment of the partnership debts and the collection and disposition of assets, was considered good.<sup>1</sup>

**Award need not Order Release.**— Where the submission itself embodies an agreement for a release of rights or demands according to the award, or where the award itself by its legal effect necessarily operates as a bar or estoppel against the enforcement at law of such rights or demands, or if it actually extinguishes them, the execution of a release by the party need not be directed.<sup>2</sup> In *Cox v. Jagger*, the submission was for the purpose of determining what sum should be paid to a widow in lieu of her dower. The award found the sum, but did not order a release of her dower to be executed by the widow. But this was said by the court to be unnecessary, for two reasons: First, because in the submission the widow had specifically stipulated and bound herself to release her dower, and “this act being provided for by the parties, it became unnecessary for the arbitrators to direct a release.” Second, because the arbitrators awarded that all suits touching the premises should cease, and that the yearly sum of thirty-five dollars is in lieu of the right of dower, and since, “in consequence of this award, the demandant could not maintain an action, the effect, as it respects the defendants, is the same as if a release had been awarded and actually executed.”

**Nor Discontinuance.**— An award under a submission, entered into in a pending cause, need not direct the discontinuance of the cause. “The legal effect of the submission, and the making an award pursuant to the submission, is to put an end to the suit.”<sup>3</sup>

But the submission must be entered into between the parties to the suit; and the award must be good as between them, and must operate as a final disposition of the cause of action. In

<sup>1</sup> *Lamphire v. Cowan*, 39 Vt. 420.

<sup>2</sup> *Cox v. Jagger*, 2 Cow. 638; *Spofford v. Spofford*, 10 N. H. 254; *Purdy v. Delavan*, 1 Caines, 320.

<sup>3</sup> *Rixford v. Nye*, 20 Vt. 132.

the absence of these facts it is certain that the failure to order a discontinuance will be fatal, and the language of the decision would by no means authorize the inference that, under any and all circumstances, the courts of New York would be willing to dispense with such an order.<sup>1</sup>

Russell says, "when the terms of the submission are such that the award will be final and certain, without showing in whose favor the cause referred is decided (though that is rarely the case, and never when costs abide the event of the cause and are to be taxed by the officer of the court), it is sufficient if the arbitrator somehow dispose of the cause absolutely."<sup>2</sup>

He gives the English adjudications, as follows:—

Awards that all suits now pending between the parties shall cease, are regarded as constituting a final determination of the suits. They are not equivalent to ordering a nonsuit, and leaving it open to the plaintiff in the pending causes to institute other suits. But the cause of action is itself taken away. The suit is to "cease absolutely for ever, so that the right itself is gone, because the remedy is quite taken away; for if the suit fail, the party has no remedy to come at his right."<sup>3</sup> In the cited case of *Knight v. Burton*, the award was that a suit in chancery should be "dismissed." The court said, "We will intend this to be meant of a substantial dismissal and a perpetual cesser in this case. If a man be to deliver up a bond to be cancelled by such a day, and he sues and gets judgment in the interim, and then delivers up the bond, this is a performance in the letter, but not in the intent. So will be such a dismissal, in case a new bill be brought afterwards." Though an old English case is to a contrary effect, and in spite of an award that all pending legal proceedings, if any, should be no further prosecuted, it was asserted that the plaintiff might

<sup>1</sup> *Vosburgh v. Bame*, 14 Johns. 302.

<sup>2</sup> *Russell on Arb.*, p. 324.

<sup>3</sup> *Simon v. Gavil*, 1 Salk. 74; *Knight v. Burton*, ib. 75. And see *Lord v. Hawkins*, 2 Hurl. & Nor. 55.



bring a suit, if he had not already brought one; and if he had already brought one, he might discontinue it and bring another.<sup>1</sup>

But an award of a discontinuance is perfectly satisfactory. An award that each party should pay his costs in certain actions, and that the actions should be discontinued, is final and good, and is in effect an award of a *stet processus*.<sup>2</sup>

**Award of a Nonsuit.**—An award of a nonsuit does not operate, in the manner aforesaid, to take away the right of instituting a new suit. It is held not to be good as a determination of the cause, by reason of its want of finality.<sup>3</sup>

A cause and all matters in difference were submitted, with authority to the arbitrator to direct a verdict or a nonsuit to be entered. The award was simply that a verdict, already entered in the cause in favor of the plaintiff, should be vacated, and that a nonsuit should be entered; and the matters at issue in the cause were in no other way disposed of. The award was held bad, as not finally determining the matters in difference in the cause. The court held that such determination was necessary, and that the power to enter a nonsuit was only given to the arbitrator for the subordinate purpose of enabling him to dispose of the cause on the record. A verdict might have had the effect of a decision, and of setting the disputes for ever at rest, which a nonsuit could not have. Parke, B., dissented regarding the termination of the pending suit by a nonsuit as terminating the cause in accordance with the stipulation of the parties.<sup>4</sup>

**Some peculiar Forms of Awards by means of Promissory Notes.**—It may be worth while to mention some few instances of awards taking the unusual and anomalous shape of promis-

<sup>1</sup> Tipping v. Smith, 2 Strange, 1024.

<sup>2</sup> Russell on Arb., p. 325; Blanchard v. Lilly, 9 East, 497; Gray v. Gray, Cro. Jac. 525.

<sup>3</sup> Knight v. Burton, 1 Salk. 75.

<sup>4</sup> Wild v. Holt, 9 Mee. & W. 161; Russell on Arb., p. 234.

sory notes of a party, since they may occasionally be of service by way of analogy or otherwise.

A submission was made by parol, and each party made his promissory note, and placed it in the hands of the arbitrators. The agreement was, that the arbitrators should hand to the party in whose favor they should decide the note of the other party. It was held that the recipient of the note of his adversary might maintain suit upon it. Want of consideration was set up as a defence, but the court said that it could not be maintained. "The note in question may be regarded as the award of the arbitrators. It was conditional when made and put into their hands, to become consummated by their decision of the matter submitted; and by such decision it has become absolute for the payment of the money awarded to the plaintiff." No evidence of "corrupt practices or improper conduct on the part of the arbitrators . . . being presented in this case, we think the award final and conclusive."<sup>1</sup>

A somewhat different theory as to the character of a note, given in a substantially similar way, has been adopted in New Hampshire. The case was as follows: Arbitrators agreed upon an award, and stated the fact of their agreement to the parties, without, however, disclosing what the award was. It was thereupon agreed verbally between the parties that the arbitrators should write mutual receipts, also a note for the amount awarded by them, and that all these instruments should be signed by the parties respectively without seeing or knowing the contents. This course was pursued. The arbitrators gave to each party the receipt of the other, and handed the note to the party who was payee. In a suit upon the note the court said that, stripped of its peculiar form, the note might be properly regarded as a promise or undertaking by the losing party to pay the amount of the award, and as such it would be binding. The adjustment of the controversy

<sup>1</sup> Shephard v. Watrous, 3 Caines, 166.

by the mutual receipts formed a sufficient consideration for such an engagement. Another view which might be taken of the same case was said to be that the note might be regarded as expressly given to secure the amount of the award. The award itself should then be considered as constituting the consideration for the note, and the note should be considered as agreed to be given and received either as security for, or in discharge and payment of, the award. The only plausible objection to the validity of the note, under either of these views, would be that the losing party might lose his opportunity of objecting to the validity of the award itself. "But the same objection applies, to a certain extent, to all submissions not made under some rule from a court or magistrate." Because in actions on an award, matters *dehors* the award cannot be availed of in defence, the only redress being in chancery. "How far, in the absence of a Court of Chancery, we ought to admit such evidence to defeat an action on the promise or on the award, is questionable. But in an action on a note by the promisee, when the note is in substance such a promise, or only security for such an award, the same defence would seem to be admissible that would be on either the original promise or the award." The same rule would obtain if the theory adopted should be that the note was given and received by agreement in actual discharge and payment of the award. It was further suggested that the maker of the note might waive his right to object to the award, by paying and discharging the same, whether by a note or by money. If he "deliberately chose to fulfil and execute the award; or, in other words, if he actually waived by this note every privilege he might otherwise have possessed to impeach the award, blame rests upon himself alone." The validity of the note appears to have been the only question really at issue in this cause, and that was upheld.<sup>1</sup>

In neither of the foregoing cases was any defence, going to the validity of the award, offered by the defendant. Conse-

<sup>1</sup> Page v. Pendergast, 2 N. H. 233.

quently neither of them contains a direct adjudication upon the admissibility and effect of evidence of such a nature. But the closing remark of the court, in *Shephard v. Watrous*, and the *obiter dictum* in *Page v. Pendergast*, both point distinctly to the rule that a defence of this kind would be competent and good in a suit on the note.

As a general rule, it may be said that notes, executed by the parties respectively at the time of the submission, and placed in the hands of the arbitrators, with directions to them to indorse down the note of the losing party to the sum they shall find against him, and then to deliver it to the party in whose favor they find, are valid, after they have been thus indorsed down and delivered.<sup>1</sup>

But it seems that if the award is altogether void, a note of a party deposited with the arbitrators, and by them handed to the other party, cannot be collected in a suit by the latter. In the case of *Towne v. Jaquith*,<sup>2</sup> decided in Massachusetts in 1809, the statement of the case recites that the parties submitted to three arbitrators a dispute as to the quantity and value of certain timber; that the referees "persuaded each party to subscribe a note payable to the other for \$2000.00, intending, when they had determined the amount due from either, to deliver both notes to the prevailing party, after having indorsed on the one payable to him such sum as would leave due thereon the sum which they should find actually due upon the adjustment. Two of the arbitrators agreed upon the balance," fixing it at \$1300.00. They reduced the note of the losing party to this sum, by indorsement, and then delivered both notes to the gaining party. In the suit on the reduced note, the defendant alleged that the award was invalid, because made by two only of the arbitrators, whereas the submission contained no authority for less than the whole number to make the award. The court held that the notes were "deposited as

<sup>1</sup> *Batley v. Butler*, 13 Johns. 157; *Page v. Pendergast*, 2 N. H. 233.

<sup>2</sup> 6 Mass. 46.

*mutual pledges*, to secure the performance of an award by *three* arbitrators; . . . that the promisee obtained the note in question in consequence of an award, consented to by two of the arbitrators, against the opinion and without the consent of the other;” that, therefore, the note could not be enforced either by the original payee, or by his indorsee taking it with knowledge of these facts.

In the following case, also, the court refused to give the note the force which the arbitrators intended. An award, returned into court under a statutory submission, was, that A. owed to B. \$1229.66, and that the note of A., held by B., for \$2000, “has been indorsed down to the sum of \$1229.66, which note, thus indorsed down, is the amount of our award; and said note, so indorsed, is held by said B. as our award.” Held, that, without passing upon the question of whether or not the award might not be upheld as a basis of adjustment between A. and B., it was yet perfectly obvious that it did not authorize the issue of an execution against A. in favor of B. for the sum declared to be due. The court said: “The award does not authorize the judgment and execution thereon, because, on the face of it, it does not award that B. is to recover any sum in money from A.” It finds the sum due, and indorses the note down to that sum, “thus directing in what manner B. is to hold the evidence that A. is indebted to him, but not discharging the note nor assuming to cancel it, but, on the contrary, directing it to be retained by B., the payee; all which is entirely inconsistent with the idea that a judgment is to be rendered by the court for so much money, and an execution to issue therefor.”<sup>1</sup>

The question, whether or not, if the payment upon the note has been made to a third party, a *bona fide* holder without notice of the facts causing the invalidity, the payer can recover back from the original payee, is left in doubt by the following case, in which the court avoided passing upon it by taking

<sup>1</sup> Day v. Laffin, 6 Metc. (Mass.) 280.

advantage of a nice point of pleading. The parties to a submission made their respective notes, and placed them in the hands of the arbitrators. The arbitrators were to indorse down the note of the losing party to the amount which they should find against him, and deliver it in this shape to the other. They did so; and the party who received the note afterward indorsed it over to a third party, to whom the maker paid it. The maker then sued the successful party to recover the amount so paid by him, on the ground that the award was void. On special demurrer the plaintiff's declaration was held bad, because it failed to aver that the transfer of the note was made before maturity. If the note was void, "payment of it should have been resisted if the defence was admissible; and, if not, the declaration in this case should show why it was not. It was, therefore, a material averment, that the note was transferred before it fell due, so as to show that the defence could not have been then set up against the note in the hands of an innocent indorsee, to whom it was transferred before it fell due."<sup>1</sup>

If the stipulation is for an award, to be made by means of the note of the losing party, it must be made in this shape, or not at all. An ordinary finding of indebtedness will be void under such a submission. The agreement between A. and B., parties to a submission, was, that A. should deliver to the arbitrators his note for five hundred dollars, and B. should deliver to them a receipt in full for all demands against A. The arbitrators were to find how much was due from A. to B., were to reduce the note to that amount, and deliver it, so reduced, to B., and were then to deliver the receipt to A. Whether or not the note and receipt were ever placed in the hands of the arbitrators did not appear. But they awarded that A. should pay to B. the sum of five hundred dollars on a day and at a place named, and that the payment should be in full satisfaction of damages and loss suffered by B. in closing up his labors and leaving the premises. Held, the award was void. The arbitrators had no

<sup>1</sup> *Batthey v. Button*, 13 Johns. 187.

authority to make it in any other shape than by means of the note and receipt, as stipulated in the submission. If the note and receipt had not, in fact, been delivered to them, this omission did not operate to enlarge their power and enable them to make an award in any other manner, but, on the contrary, left them without any authority in the premises whatsoever.<sup>1</sup>

**Professional Assistance in Drawing Award.**—In England it is considered “highly objectionable” for an arbitrator, even after coming to his decision, to employ the lawyer of a party to the submission to draw it up in legal form. “It may even endanger the award being set aside.”<sup>2</sup>

Erle, C. J., in *In re Underwood and Bedford & Cambridge Railway Company*, said that he must “highly disapprove” of this course of the arbitrator, as subjecting him to the suspicion of having been swayed by communications or information derived from one side only. But an affidavit by the arbitrator positively denied that he had had advice or assistance from or communication with this counsel until after he had fully made up his mind as to the sum he should award; and other evidence corroborated this statement. Wherefore the judge said, he did not feel justified in going so far as to set aside the award, but he thought enough appeared to afford a justification for the appeal to the court, and therefore he ordered that the rule should be discharged without costs.

But it has been already stated<sup>3</sup> that, after the arbitrators have come to their conclusion, there is no objection to their availing themselves of professional assistance in drafting their award, provided they do not resort to the counsel of either party.

**Recitals of the Submission and Proceedings in the Award.**—There is no legal necessity for a recital in the award of any

<sup>1</sup> *Allen v. Galpin*, 9 Barb. 246.

<sup>2</sup> *Russell on Arb.*, p. 236; *In re Underwood and Bedford & Cambridge Railway Co.*, 11 C. B. N. s. 442; 31 L. J. C. P. 10; *Fetherstone v. Cooper*, 9 Ves. Jr. 67.

<sup>3</sup> Part II., Chap. V., the paragraph on Delegation of Authority.

portion of the submission. Yet recitals verbatim of so much of the submission as confers upon the arbitrator his authority, and describes the subject-matter concerning which his authority is to be exercised, are of frequent occurrence. It would be difficult to suggest any objection to a verbatim recital; and, upon the other hand, it has the advantage of presenting with accuracy, for use in future time, a record of the matter in dispute, and which the arbitrators assume to have disposed of. Then, though the submission itself may happen to be lost, the deficiency may be supplied from the very document relied upon as establishing the decision. But a recital paraphrasing or briefly compressing the substance of the submission in the aforementioned particulars, is open to the objection that some real or fancied discrepancy between the two instruments might be made the source of sincere or pretended misunderstanding, and of consequent litigation. If any recital is made, it is, therefore, safest to use the very words of the parties.

But no recital of any description whatsoever, whether from the submission or concerning the proceedings, is essential to the validity of the award. If made, it will be entirely gratuitous.

Accordingly an award need not recite the various facts necessary to give it validity. Their actual existence is sufficient, and will be presumed, until the contrary is affirmatively proved. Thus it need not be stated, or made to appear upon the face of the award, that the parties were heard;<sup>1</sup> or that all the legal evidence presented by either party was admitted;<sup>2</sup> or that all the arbitrators were present at the hearing.<sup>3</sup> An extension of time need not be recited, even though the award is made after the expiration of the period originally set.<sup>4</sup> Neither need the arbitrator state that he has done any specific act, his doing which was prescribed in the submission as a condition prece-

<sup>1</sup> *Houghton v. Burroughs*, 18 N. H. 499.

<sup>2</sup> *Inhabitants of Leominster v. Worcester R.R. Co.*, 7 Allen, 38.

<sup>3</sup> *Rixford v. Nye*, 20 Vt. 132.

<sup>4</sup> *Baker v. Hunter*, 16 L. J. Exch. 203; 16 Mee. & W. 672; *George v. Lonsley*, 8 East, 12.



dent to his right to proceed in the arbitration and to award ; as, for example, taking a view of the premises in dispute.<sup>1</sup>

So where an arbitrator was not to proceed with the arbitration until after he had awarded in a certain specified action, his neglect to state that he had awarded in that action was not regarded as a ground for vacating his award. It was presumed, in the absence of contrary evidence, that he had taken this step, which was a necessary preliminary to qualify him to arbitrate.<sup>2</sup>

**Erroneous Recitals.**—An erroneous or false recital, made by the arbitrator, if it be merely concerning his authority, appears to be an immaterial matter. It does not enlarge his authority,<sup>3</sup> nor does it invalidate his award.<sup>4</sup> Provided it does not appear that, as matter of fact, he has acted upon this enlarged conception of his powers, and has considered things which he ought not to, no real harm is done by the mere misunderstanding.

An arbitration bond was entered into between A. and B. concerning a boundary line. At the argument it appeared that another controversy, also concerning a boundary line, was pending between B. and C., and had been by them submitted, by other bonds, to these same arbitrators. In their award, under the submission between A. and B., the arbitrators recited that A. and C. of the one part, and B. of the other part, had submitted their differences. But they proceeded to determine the line "between said A. and B.," and were silent as to the line between B. and C. Held, that the inaccurate recital did not affect the validity of the award.<sup>5</sup>

Erroneous statements, embodied in the award, concerning facts or occurrences during the proceedings, are not necessa-

<sup>1</sup> *Spence v. Eastern Counties Railway Co.*, 7 Dowl. 697 ; *Davies v. Pratt*, 25 L. J. C. P. 71 ; 17 C. B. 183.

<sup>2</sup> *Davies v. Pratt*, 17 C. B. 183.

<sup>3</sup> *Dibblee v. Best*, 11 Johns. 103 ; *Price v. Popkin*, 10 Ad. & El. 139.

<sup>4</sup> *Dibblee v. Best*, 11 Johns. 103 ; *Watkins v. Philpotts*, M'Lel. & Y. 393 ; *Baker v. Hunter*, 16 Mee. & W. 672.

<sup>5</sup> *Caldwell v. Dickinson*, 13 Gray, 365.

rily fatal to the validity of the instrument. For example, the misnomer, in an umpire's award, of the Christian name of an original arbitrator;<sup>1</sup> the statement that the umpire was chosen by the parties, instead of by the arbitrators;<sup>2</sup> an erroneous recital of the date of the submission;<sup>3</sup> or of an extension of time, even though thereby the award appeared to have been made too late;<sup>4</sup> a misstatement of the extent of the subject-matter;<sup>5</sup> or where the award recites that it is made by three, and in fact it is executed only by two.<sup>6</sup>

But it is conceivable that an erroneous statement concerning a fact essential to the validity of the award might be a different matter, and might have a different effect from the comparatively harmless instances of error above noted. Thus a recital of an appearance by a party, when there had not been an appearance, would be too material an error to be overlooked. Of course, as against the non-appearing party, the award would be void. The false statement could not bring him within its operation. But whether or not, if there were other parties, as between whom the award would be valid, this error would suffice to vacate it, is a question which no adjudication determines.

**Referee need not Report Evidence.**—A referee, unless specially ordered so to do by the court, need not report his rulings upon the admission or rejection of testimony.<sup>7</sup> Indeed, it is the general and familiar practice for him not to do so.

**Stipulations for Delivery of the Award.**—A stipulation that the award shall be delivered or ready for delivery on or before a day certain, or within a time named, is of frequent occur-

<sup>1</sup> *Trew v. Burton*, 1 Cr. & M. 533.

<sup>2</sup> *Adams v. Adams*, 2 Mod. 169; Vin. Abr. Arb. N. 2, 3.

<sup>3</sup> *Dole v. Dawson*, 2 Keb. 878; Vent. 184; *Ingram v. Webb*, 1 Rolle's Rep. 362.

<sup>4</sup> *Addison v. Spittle*, 6 Dowl. & Low. 531; *Baker v. Hunter*, 16 Mee. & W. 672; *George v. Lonsley*, 8 East, 12.

<sup>5</sup> *Paull v. Paull*, 2 Cr. & M. 235; 2 Dowl. 340; *Kynaston v. Jones*, Styles, 97.

<sup>6</sup> *White v. Sharp*, 12 Mee. & W. 712; 1 Dowl. & Low. 1030; overruling *Thomas v. Harrop*, 1 Sim. & St. 524.

<sup>7</sup> *State v. Petticrew's Ex'r*, 19 Mis. 373.

rence in submissions. Mr. Russell says: "When it is made, it is *ready to be delivered*, and the court will so intend it, especially where it is to be ready to be delivered on request."<sup>1</sup> The delivery need not actually take place, if the stipulation be only that the award shall be ready for delivery. The *status* of readiness will be sufficient.<sup>2</sup>

The American rule resembles the English. That an award was ready for delivery upon a certain day, will be inferred from the fact that it was made and executed, or that it was made and published, or even from the simple fact that it was made on that day.<sup>3</sup>

A stipulation that it shall be *made*, is not equivalent to a stipulation that it shall be delivered. A bond was conditioned to abide by such award as should "be made in writing on or before" a day named. It was held that "nothing more was necessary than that the award should have been made within the term appointed."<sup>4</sup>

A submission required an award to be ready on a certain day. All that appeared was, that it was first called for on the next day after that named, and that it was then delivered in a complete state. But it bore date on the day of delivery. Held, that the mere fact of the date was not sufficiently strong evidence to overcome the presumption in favor of regularity and accuracy on the part of the arbitrators.<sup>5</sup>

But the readiness must be complete, so that the delivery of a valid and perfect instrument could be made, if it should be demanded by a party. An award, drawn and executed in every

<sup>1</sup> Russell on Arb. and Award, 3d ed. p. 237, citing *Veale v. Warner*, 1 Saund. 327 b, notes; *Garret v. Weeden*, 1 Lev. 133; *Bradsey v. Clyston*, Cro. Car. 541; *Marks v. Marriot*, 1 Ld. Raym. 114; *Freeman v. Bernard*, ib. 247; *Joyce v. Haines*, Hard. 399; *Robison v. Calwood*, 6 Mod. 82; *Anon.*, 2 Ld. Raym. 989.

<sup>2</sup> *Brown v. Vawser*, 4 East, 584.

<sup>3</sup> *Rundell v. La Fleur*, 6 Allen, 480; *Houghton v. Burroughs*, 18 N. H. 499.

<sup>4</sup> *Houghton v. Burroughs*, 18 N. H. 499.

<sup>5</sup> *Owen v. Boerum*, 23 Barb. 187.

particular, but not duly stamped, is, by reason of that deficiency alone, not ready for delivery.<sup>1</sup>

It was said by Chancellor Walworth, in *Bloomer v. Sherman*,<sup>2</sup> that where, by the terms of the submission, the award is to be made in a particular form, the award is not made and ready for delivery until all the required forms are complied with. Thus where the submission stipulated for the attestation of a subscribing witness, it was held that this attestation would be absolutely indispensable at common law before the state of readiness for delivery could begin to exist.

But a stipulation for delivery is fulfilled only by actual delivery, and the award, though ready, is void if not delivered at or within the time named.<sup>3</sup>

It is not necessary that a copy of the award should be furnished to each party, if neither the submission, nor the statute under which the submission is made, specially require such delivery.<sup>4</sup>

**Delivery must be of the Original Award.**—If the submission contains no stipulation to the contrary, delivery of the original award should properly be made, and can be claimed by either party. But if, before the time limited for the delivery has elapsed, a sworn copy of the award be delivered to each party, and be received by each without objection, this will constitute a waiver of the right to receive the original, and its retention by the arbitrators will not affect its validity.<sup>5</sup>

**Delivery in Duplicate.**—If the submission contain a condition or stipulation for delivery of the award to “the parties,” duplicate originals or counterparts must be prepared, one for each party, or the award may be avoided.<sup>6</sup> “The only

<sup>1</sup> *Wilson v. Wilson*, 1 Saund. 327 c, n. (m). See this case stated, *post*, under “Pleading concerning Delivery.”

<sup>2</sup> 5 Paige, 575.

<sup>3</sup> Russell on Arb., 8d ed. p. 238.

<sup>4</sup> *Wade v. Powell*, 31 Geo. 1; *Houghton v. Burroughs*, 18 N. H. 499.

<sup>5</sup> *Sellick v. Adams*, 15 Johns. 197; *Houghton v. Burroughs*, 18 N. H. 499.

<sup>6</sup> *Buck v. Wadsworth*, 1 Hill, 321; *Pratt v. Hackett*, 6 Johns. 14.

method," said Cowen, J., "by which the condition of a bond such as this can be rendered binding, is by the arbitrators executing and delivering two parts, unless one party shall expressly discharge them of that necessity, as by telling them they need make no counterpart, for he will not receive it; or, as in *Sellick v. Adams*,<sup>1</sup> by accepting sworn copies in lieu of the original, without objection."<sup>2</sup> So, likewise, it has been held, rather rigidly, in England, that a requirement of delivery to either party is satisfied only by delivery to both parties.<sup>3</sup>

**Waiver of Actual Delivery.**—Though there be a stipulation for delivery, yet actual delivery may be waived by the parties. An arbitration bond was conditioned "so as the award be in writing under the hands and seals of the arbitrators, or a major part of them, and ready to be delivered to the parties in difference, or any of them requiring the same, on or before the first day of September then next." On the question of a delivery under this stipulation, the court, *per* Kent, C. J., said that "the evidence was sufficient to show that the defendants had admitted a delivery, or waived the necessity of any. The award was, on the 25th of August, duly executed and produced to the parties; and it was twice read over by the arbitrators to the defendants, and they appeared to be satisfied with it, and promised to perform it, and did, in fact, make a part performance, by paying sixty-three dollars, which was part of the sum awarded to be paid; and they did not require a copy of the award, or a duplicate original; and the arbitrators then finally separated. This was the consummation of the business. The defendants were concluded from alleging afterwards, that the award had not been delivered according to the condition of the bond. They were bound to speak then, at the time of the publication, and when the arbitrators were on the point of con-

<sup>1</sup> 15 Johns. 197.

<sup>2</sup> *Buck v. Wadsworth*, 1 Hill, 321.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 238; *Parker v. Parker*, Cro. Eliz. 448; *Block v. Palgrave*, ib. 797.

cluding and dispersing, if they required any further notice, publication, or delivery. No circumstances could be stronger from which to infer acquiescence in that mode of delivery, and a waiver of any delivery more formal. Evidence of part payment at that time was properly introduced to show the acquiescence of the defendants in the production and reading of the award, as amounting to a delivery of it, and as being all the delivery required.”<sup>1</sup>

**To whom Delivery is to be Made.**—Delivery is customarily made to the prevailing party, and, being thus made, is sufficient, unless the submission calls for delivery to “the parties,” or otherwise specifically requires that duplicate originals or copies should be given to other persons.<sup>2</sup> But, in England, either party can generally obtain it, on payment of the arbitrator’s fees.<sup>3</sup> Demand, even by a person entitled to receive an award or copy, must be reasonably made, both as regards time and place, and also as regards the member of the board of arbitrators of whom it is made. Each arbitrator, as the court in New Hampshire remarked, cannot be expected to have a copy in his pocket at all hours.

The American practice with regard to delivery is said to be, in the absence of express stipulations in the submission, that the arbitrators deliver their award to the party deriving a title or right of action under it, as being the party entitled, for obvious reasons, to its possession. This is “all the delivery known to our practice, and all that seems to be required for the ends of justice.” It is not customary for the arbitrators to prepare as many awards as there are parties. Though it might, in some exceptional cases, become proper to do so, if each party, by the peculiar nature of the award, should derive some title or acquire some right of action under it. Neither is it usual for copies to be prepared for delivery to the unsuc-

<sup>1</sup> Perkins v. Wing, 10 Johns. 143.

<sup>2</sup> Houghton v. Burroughs, 18 N. H. 499; Buck v. Wadsworth, 1 Hill, 321; Pratt v. Hackett, 6 Johns. 14.

<sup>3</sup> Russell on Arb., 3d ed. p. 228; Hicks v. Richardson, 1 Bos. & P. 93.

cessful parties though Russell says the practice in England is to deliver unstamped copies to the losing parties.<sup>1</sup>

**What Constitutes Delivery.** — A copy of an award was handed by an arbitrator to the son of one of the parties, sixteen years old, standing at the time near the house, and in charge of it, and who immediately carried the document into the house. Held, that this was a sufficient delivery to or service upon the party.<sup>2</sup>

**Delivery of an Oral Award.** — An oral award is capable of delivery, which will be made by pronouncing it to the parties.<sup>3</sup> When the case of *Oates v. Bromhill* first came before the court,<sup>4</sup> they were much at a loss what to do with it, but afterward, upon another hearing,<sup>5</sup> it was said, *per totam curiam*, “upon great consideration, notwithstanding the late case in the Common Pleas, a parol award is capable of delivery, viz., a declaration of it to the parties, or either of them, if they desire it; and that being so, as soon as the arbitrators have agreed on the award, it is ready to be delivered.”

**Pleading Delivery.** — The plaintiff’s declaration need not aver that the award was ready to be delivered on a certain day, if it avers a making or publication on or before that day. The readiness is included in the making or publishing.<sup>6</sup> But the presumption may be rebutted by a direct averment, by the defendant, of non-readiness,<sup>7</sup> and will be destroyed by proof of such non-readiness; as, for example, by proof that a party entitled to the award demanded it on the day, and that it was refused to him.<sup>8</sup>

<sup>1</sup> *Houghton v. Burroughs*, 18 N. H. 499.

<sup>2</sup> *Conrad v. Johnson*, 25 Ind. 487.

<sup>3</sup> *Oates v. Bromhill*, 6 Mod. 176.

<sup>4</sup> 6 Mod. 160.

<sup>5</sup> 6 Mod. 176.

<sup>6</sup> *Munro v. Alaire*, 2 Caines, 320; *Pratt v. Hackett*, 6 Johns. 14 (*per Kent*, C. J.); *Houghton v. Burroughs*, 18 N. H. 499.

<sup>7</sup> *Pratt v. Hackett*, 6 Johns. 14.

<sup>8</sup> *Houghton v. Burroughs*, 18 N. H. 499; *Wilson v. Wilson*, 1 Saund. 327 c. n. (m.)

A condition in a submission was, "so as the said award be made, and ready to be delivered and given up to the said parties, or such of them as should desire it." The court said: "The readiness of delivery need not to have been averred, because the alleging an award made imports it. Nor is the condition in the submission therefore vain; for if, after the award made, the parties, or either of them, had come and asked the arbitrators what award they had made, and they had refused to tell, then he might plead that it was not ready to be delivered, showing that matter. So, perhaps, if the arbitrators had died in so short a time after the award made that the party could not have had convenient time to ask them, [the award in this case was oral]. For the intent of the condition was, that the parties should have notice of the award."<sup>1</sup>

**How Non-delivery is to be Availed of.** — If the defect to be relied upon is a non-delivery within the time stipulated, a plea of "no award" will be bad. Request and refusal to deliver must be specifically averred.<sup>2</sup>

Kent, C. J., said: "If the award had not been delivered upon request, as the defendants contend, they should have pleaded specially such a request and refusal. The objection cannot be raised under the plea of no award. This rule has been declared and settled repeatedly.<sup>3</sup> The form of plea in such a case is stated in *Wilson v. Wilson*, as reported in note, § 3, in 1 Saunders, 327 *b.*" In Saunders, at the place cited, we find it stated that, "if either of the parties do, on the last day, request the arbitrators to deliver the award to him, and they neglect or refuse to do so, the bond is void; and the defendant must not say '*nul award*,' but he should plead the matter specially, namely, that he requested the arbitrators to deliver the award, and they refused to do so. . . . So, in a late

<sup>1</sup> *Oates v. Bromhill*, 6 Mod. 176.

<sup>2</sup> *Perkins v. Wing*, 10 Johns. 143 (*per* Kent, C. J.); *Munro v. Alaire*, 2 Caines, 320.

<sup>3</sup> *Rowsby v. Manning*, 3 Mod. 331; *Markes v. Marryott*, 1 Lutw. 524; *Oates v. Bromhill*, 6 Mod. 176.



case of *Wilson v. Wilson*, C. P. Sittings in London, after Hilary Term, 1798, before Eyre, C. J., where in debt on bond conditioned for performance of an award," conditioned to be "ready to be delivered to the said parties in difference, or such of them as shall require the same, on or before" a day named, "the defendant pleaded that the arbitrators did make their award on the day limited in the condition, and that he on that day required them to deliver their award to him, but they neglected and refused so to do; and issue being joined thereon, it appeared in evidence that the arbitrators had made their award on the day, but, because it was not stamped, refused to deliver it to the defendant, according to his request; and, upon this evidence, the jury, under the direction of his Lordship, who thought it an extreme hard case, found that the arbitrators had not complied with the condition of the bond, and gave a verdict for the defendant; and the plaintiff's counsel, being satisfied both of the law and fact, acquiesced."

**Publication of the Award.** — Publication of an award is necessary only where the submission expressly stipulates that it shall be published or notified to the parties.<sup>1</sup>

The American adjudications concerning what constitutes publication are few, substantially as follows: —

Execution of an award in duplicate, and delivery of one of the duplicate originals to each party to the submission, is a publication.<sup>2</sup>

Where the award is delivered to the prevailing party, and by him or his agent is carried to the losing party, who is thereupon notified thereof, and requested to pay the amount, there is a sufficient publication to the latter party; and, of course, also to the former.<sup>3</sup>

The condition in an arbitration bond required the award to be "made and published in writing." The court construed

<sup>1</sup> *Parsons v. Aldrich*, 6 N. H. 264.

<sup>2</sup> *Plummer v. Morrill*, 48 Maine, 184.

<sup>3</sup> *Knowlton v. Homer*, 30 Maine, 553.

this as meaning, not only that the award should be made in writing, but that the parties should be enabled to obtain a knowledge of it in writing. But it was not necessary that they should be informed in writing that an award had been made, and was subject to their examination. It appeared that one of the parties had paid the fees of the arbitrators, and asked for their copy of the award, which had been refused to him. But this, as it was said, constituted no breach of the condition, since it did not show that he might not have read it, had he wished to do so. Shepley, C. J., said: "It was stated, in the case of *Knowlton v. Homer*, 30 Maine, 552, that an award should be considered as published when the parties were informed that it was within their reach, on payment of the charges. This must be understood, when the condition of the bond is like the present, to mean when they are legally entitled to it, or to examine and read it. If it should be wrongfully withholden from them, after the referees had fully performed their duties, had made up and signed their award, and communicated it to them, its validity would not be thereby impaired."<sup>1</sup>

Where an award was executed by the arbitrators, and delivered by them to the successful party, within the time limited by the submission, it was held that this was a sufficient publication of the award.<sup>2</sup> It does not appear from the report of this case that the submission contained any stipulation concerning publication.

Where owners of adjoining estates, meeting with arbitrators selected between them in relation to another dispute, agreed orally that they should also run the line between the two estates; and with the assistance of the parties the arbitrators accordingly did then and there run the line; it was held that, the parties being witnesses to the act, no formal publication was required, or even expected.<sup>3</sup>

<sup>1</sup> *Thompson v. Mitchell*, 35 Maine, 281.

<sup>2</sup> *Rixford v. Nye*, 20 Vt. 132.

<sup>3</sup> *Jones v. Dewey*, 17 N. H. 596.

An award, duly made and sealed up, was left with one of the arbitrators; the parties appeared before him, and the award was then read to them at their request. Held, that "no further publication was required to give effect to the award."<sup>1</sup>

An award was made in writing, and copies handed to the parties, with the proviso that it might not be found to be an accurate expression of the real decision of the arbitrator as to the description of a boundary line, which real decision was explained to the parties verbally; and that if it should be found, on consultation with the surveyor, not to be so, it would be amended. The original, signed and sealed, was kept in the hands of the chairman, for making this amendment, should it prove necessary. It did prove necessary, and he made it, but did not communicate the fact to the parties, or either of them, probably considering that the verbal explanation was all that was necessary, since it had described fully what the award really was. But the court held that there was no publication of the written award.<sup>2</sup>

A stipulation, that an award be made and published to the parties, is said not to imply a formal notification to the parties.<sup>3</sup>

When referees are required to make their report and return it into court, the publication of it is the reading it and filing it in court.<sup>4</sup>

The reading an award to the parties by the arbitrators was spoken of as a publication, by Kent, C. J., in *Perkins v. Wing*,<sup>5</sup> though it was not necessary directly to hold it to be such.

It is obvious that these form no sufficient basis for laying down any general rule upon the subject of what description of act will, or what will not suffice to constitute publication. All the cases above cited would seem to contemplate some more or

<sup>1</sup> *Rundell v. La Fleur*, 6 Allen, 480.

<sup>2</sup> *Caldwell v. Dickinson*, 13 Gray, 365.

<sup>3</sup> *Hunt v. Wilson*, 6 N. H. 36; citing *Caldwell*, 51.

<sup>4</sup> *Den, ex dem. Pancoast v. Curtis*, 1 Halst. 415.

<sup>5</sup> 10 Johns. 143.

less formal act, equivalent at least to an actual or constructive notification of the contents of the award to the parties. And this notion perhaps derives some slight degree of corroboration from the rule laid down in some cases, that a party cannot be sued upon an award till he has been notified of it. Yet no cause gives us any right to regard publication as equivalent to or identical with notification. Indeed, the English rule and the English cases are to a very different effect. Mr. Russell says: "So far as the validity of the award is affected, it will in general be considered as '*published*' as soon as the arbitrator has done some act whereby he becomes *functus officio*, and has declared his final mind, and can no longer change it; that is, as soon as he has made a complete award."<sup>1</sup>

An English case has also declared that, where the arbitrator had executed the award in the presence of attesting witnesses, and had read it over to them, and the plaintiff died on the morning of the next day, before notice of the readiness of the award had reached either him or his attorney, the award was to be considered as made and published before the death.<sup>2</sup>

But, "so far as regards the rule which regulates the time for an application to set aside an award, the publication, from which the time begins to run, is not in any case the publishing of the award itself, but the publication of it to the parties."<sup>3</sup>

From this language it might be inferred that a subtle distinction is to be drawn between the simple *publication of the award* and a *publication of the award to the parties*. If this be so, an award may be published before it has been published to the parties. It would then be fair to assume that publication *to the parties* could only be made by some act affecting them, either in fact or constructively, with a knowledge of the contents of the award; as, for example, a reading or delivery to

<sup>1</sup> Russell on Arb., 3d ed. p. 236; citing *Henfree v. Bromley*, 6 East, 309; *MacArthur v. Campbell*, 5 B. & Ad. 518.

<sup>2</sup> *Brooke v. Mitchell*, 6 Mee. & W. 473.

<sup>3</sup> Russell on Arb., 3d ed. p. 237; citing *MacArthur v. Campbell*, *supra*; *Brooke v. Mitchell*, *supra*; *Moore v. Darley*, 1 C. B. 445.

them. The distinction, though nice, is not without reasonable foundation in the strict force of the respective phrases. Perhaps, too, it is borne out by the ruling in *Brooke v. Mitchell, supra*. For in that case it is obvious that there had been no real or constructive publication to the parties, though the court held that there had in fact been a *publication*.

In *Musselbrook v. Dunkin*,<sup>1</sup> the court said that the requirement that an award should be published was "satisfied by the award having been made, and notice having been given to the parties that it is within their reach on payment of just and reasonable expenses."

In *McArthur v. Campbell*,<sup>2</sup> an award was held to be published when the arbitrator gave notice to the parties that it might be had on payment of his charges; without regard to whether or not these charges were just and reasonable.

Publication to some only of several persons who together constitute the party of the one part is insufficient. Thus, under a submission requiring publication of the award to be made to *each of the parties*, the plaintiff was party of the one part, and several defendants constituted the party of the other part. A publication to the plaintiff and to one only of the defendants was held to be insufficient, and ground for avoiding the award.<sup>3</sup>

**Possession of Award.** — Possession of an award, to all appearance complete, by a party to the submission is *prima facie* evidence that the arbitrators have delivered it to him as their award; and unless explained away by satisfactory proof will suffice to render a subsequent award made and returned by them null and void.<sup>4</sup>

The fact that possession of an award has been wrongfully or improperly obtained by a party does not invalidate it or affect

<sup>1</sup> 9 Bing. 605.

<sup>2</sup> 5 Barn. & Ad. 518.

<sup>3</sup> *Hungate v. Mease*, Cro. Eliz. 885; 5 Rep. 108; F. Moore, 642.

<sup>4</sup> *Lansdale v. Kendall*, 4 Dana, 613.

his right to sue upon it.<sup>1</sup> The award is as good and binding as if possession of the instrument itself had been rightfully obtained, or even as if it had remained in the hands of the arbitrators.

**Neither Party is bound to Notify the other of the Award.**—Where the submission stipulated only that the award should be made in writing on or before a day named, and said nothing specifically about delivery or publication, it was said that both parties were bound to take notice of the award, and it was not incumbent upon the party seeking to found an action upon it to give any notice to the other.<sup>2</sup> Other cases, however, hold that notice is necessary before suit can be brought.<sup>3</sup>

<sup>1</sup> *Thompson v. Mitchell*, 35 Maine, 281.

<sup>2</sup> *Houghton v. Burroughs*, 18 N. H. 499; *Hodsden v. Harridge*, 2 Saund. 62 a.

<sup>3</sup> *Woodbury v. Northy*, 3 Greenl. 85; *Wright v. Smith*, 19 Vt. 110.

## CHAPTER X.

### MISTAKE IN THE AWARD.

Inconsistency of judicial decisions.

Two classes of decisions.

Conclusiveness of the arbitrator's decision, both in law and fact, asserted by  
C. J. Shaw.

This doctrine is generally acknowledged.

A general submission constitutes arbitrators final judges of law and fact.

Cases establishing the finality of the arbitrator's finding in matter of law.

Exception to the broad principle, in matter of law.

The exception covers two classes of cases.

Insertion of restriction in the submission.

The award may give the court the right to interfere for a mistake in law.

Statement by the arbitrator of an intention to be governed by law.

The decisions in Vermont.

Statement of grounds, &c., of decision in the award.

The rule in this matter in England.

Suggestion of a distinction.

Effect of a recital of facts in the award.

The statement of grounds, &c., must constitute a part of the award.

The fundamental matter is the arbitrator's intent.

Error in a fundamental and clear principle of law.

Awards on questions of pure law.

Distinctions between professional and non-professional arbitrators.

Matters of fact are peculiarly within the arbitrator's authority.

Exception where the judgment has been prevented from being fairly or correctly exercised.

Mistake of an arbitrator as to contents of award.

The general doctrine that a mistake is ground for vacating an award..

The English authorities supporting this doctrine.

The case of *In re Hall & Hinds*, and comments upon it.

Mistakes of the arbitrator on his own principles.

Objection that the award is against evidence.

Clerical errors, blunders in calculation, &c., in the award.

The court cannot alter a report or award.

Variance in duplicate awards.

Method of availing of an alleged mistake.

Recommitment for correction of acknowledged errors.

Recommitment for re-hearing.

Recommitment for errors in form.

Recommitment for costs.

Power and duty of the arbitrator after recommitment.

Recommitment is for the discretion of the court.

Recommitment must be of the whole case.

Impeaching the award by extrinsic evidence, or by the arbitrator's testimony of a mistake.

Effect of setting aside a report.

Promise to correct error.

**Inconsistency of Judicial Decisions.**— We now approach the most difficult topic in the law of arbitration, to wit, the question, what will be the effect of a mistake made by the arbitrator in matter of law or of fact, not obvious on the face of the award itself? The embarrassment in dealing with this matter lies in the utter inconsistency of the judicial decisions; for so soon as we seem to have successfully deduced a rule or principle from some of them, we straightway find it contradicted by other authorities. Thus the only certain element is the entire uncertainty.<sup>1</sup> The trouble exists in England to an even greater extent than in our own country. Russell acknowledges that "a close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake."<sup>2</sup>

**Two Classes of Decisions.**— The numerous adjudications may be separated into two grand classes, to wit, those which are based upon defined, intelligible, and generally consistent principles; and those which cannot be said to be founded upon or to embody any legal principle or doctrine whatsoever, but which subject each case to the arbitrary exercise of judicial discretion. From the former class it is possible to build up a philosophical theory capable of general application. In the latter class there is no philosophy, nothing of a general nature whatsoever, except, perhaps, a sort of dogmatic assertion, either declared or necessarily to be inferred in every instance, which seems to be substantially to the effect that the court in

<sup>1</sup> Lord Ellenborough acknowledged the same difficulty, in *Chace v. Westmore*, 13 East, 356; and Chief Justice Parker, in *Jones v. Boston Mill Corporation*, 6 Pick. 148.

<sup>2</sup> Russell on Arb., 3d ed. p. 292.



each case will do what it thinks fit. The former, as the more deserving, and fortunately also the growing class, will be discussed first. But it should be borne in mind that even the fundamental rules established by these cases will be found later in the chapter to have been disregarded and denied by many tribunals. It is noticeable also that the theory of this subject has been much more carefully studied and fully elaborated by American than by English judges. The latter have usually contented themselves with the brief annunciation of their decision in the specific case, whereas in the United States the opinions have usually been exceptionally long and carefully prepared.

**Conclusiveness of the Arbitrator's Decision, both in Law and Fact, asserted by C. J. Shaw.**—The ablest discussion of the subject is to be found in the opinion delivered by Chief Justice Shaw, in the famous cause of the Boston Water Power Company *v. Gray*.<sup>1</sup> Very valuable interests were involved in this litigation; the arguments were made by the foremost counsel in New England, and the elaborate opinion in which this distinguished jurist embodied the results of his careful examination into the subject is probably not surpassed in the volumes of American reports.

The language of the Judge is: "In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. . . . When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted; because they are judges of the parties' own choosing. Their decision of matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judi-*

<sup>1</sup> 6 Metc. (Mass.) 131.

*cata*; it is the *final judgment* for that case and between these parties. It is amongst the rudiments of the law, that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law." . . . When the parties have expressly or by reasonable implication submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle for a court of law or equity to rejudge the same question, as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous."

**This Doctrine is generally Acknowledged.**—Thus strongly is the general doctrine of conclusiveness laid down. And certainly there is abundant authority to support it. In many cases arbitrators have been declared to be the supreme and final judges of both the law and the facts.<sup>1</sup>

Their decision cannot be appealed from, revised, or annulled by reason of any mistake which they may have fallen into.<sup>2</sup>

<sup>1</sup> *Rundell v. La Fleur*, 6 Allen, 480; *White Mountains Railroad v. Beane*, 39 N. H. 107; *Kleine v. Catara*, 2 Gall. 61; *Myers v. York & Cumberland R.R. Co.*, 2 Curtis, C. C. 28; *Brown v. Clay*, 31 Maine, 518; *Tyler v. Dyer*, 13 id. 41; *Whitmore v. Le Ballistier*, 35 id. 488; *Sweetser v. Kenney*, 32 id. 464; *Walker v. Sanborn*, 8 Greenl. 288; *Johnson v. Noble*, 13 N. H. 286; *Indiana Central R.R. Co. v. Bradley*, 7 Ind. 49; *De Long v. Stanton*, 9 Johns. 38.

<sup>2</sup> *York & Cumberland R.R. Co. v. Myers*, 18 How. (U. S.) 246; *Burchell v. Marsh*, 17 id. 344; *Jackson v. Ambler*, 14 Johns. 96; *Cranston v. Kenney's Executors*, 9 id. 212; *Campbell v. Western*, 3 Paige, 124; *Greenough v. Rolfe*, 4 N. H. 357; *Beane v. Wendell*, 22 id. 582; *Mitchell v. Bush*, 7 Cow. 185; *Jones v. Boston Mill Corporation*, 6 Pick. 148; *Ewing v. Beauchamp*, 3 Bibb, 41; *Baker's Heirs v. Crockett, Hardin*, (Ky.) 388; *Ewing's Administrators v. Beauchamp*, 2 Bibb, 456; *Bumpass v. Webb*, 4 Porter, 65.

Russell lays down the "general rule, that as arbitrators are judges of the parties' own choosing, they cannot object to their decision as an unreasonable judgment, or a judgment against law."<sup>1</sup> Though, as will hereafter be seen, this general rule is nearly as often broken as it is observed in the English courts.

To set aside an award for an error, whether in law or fact, "would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." Thus says Mr. Justice Grier, in proceedings under a bill in equity to set aside an award; adding that "courts should be careful to avoid a wrong use of the word 'mistake,' and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards."<sup>2</sup>

"We take one principle to be very clear," said Chief Justice Parker, in 1828, "which is, that where it manifestly appears by the submission that the parties intended to leave the whole matter, law and fact, to the decision of arbitrators or referees, the award is conclusive, although they should have mistaken the law, unless the award itself refers such question to the consideration of the court."<sup>3</sup>

Cockburn, C. J., says, in *Hodgkinson v. Fernie*,<sup>4</sup> in 1857: "It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding that unless there be something upon the face of an award to show

<sup>1</sup> Russell on Arb., 3d ed. p. 293; citing *Fuller v. Fenwick*, 3 C. B. 705; 16 L. J. C. P. 79; *In re Marsh*, 16 L. J. Q. B. 330; *Steff v. Andrews*, 2 Madd. 6; *Ives v. Metcalfe*, 1 Atk. 63; *Evans v. Pratt*, 3 Man. & Gr. 759; *Hodge v. Burgess*, 3 Hurl. & Nor. 298; 27 L. J. Exch. 318; *Hodgkinson v. Fernie*, 27 L. J. C. P. 66; 3 C. B. N. S. 189; *Baggalay v. Mackwick*, 30 L. J. C. P. 342; 10 C. B. N. S. 61; *Gensham v. Germain*, 11 Moore, 1; *Hagger v. Baker*, 14 Mee. & W. 9. So also is the ruling in *Young v. Walter*, 9 Ves. Jr. 364.

<sup>2</sup> *Burchell v. Marsh*, 17 How. (U. S.) 344.

<sup>3</sup> *Jones v. Boston Mill Corporation*, 6 Pick. 148.

<sup>4</sup> 3 C. B. N. S. 189; 27 L. J. C. P. 66.

that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. . . . So, here, the parties have selected their own tribunal; and they are bound by the decision, be it right or wrong."

Lord Ellenborough, C. J., said (1816), that where the merits both in law and fact are referred to an arbitrator of competent knowledge (in this case a barrister), "the court will not open the award, unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator."<sup>1</sup>

**A General Submission constitutes Arbitrators Final Judges of Law and Fact.**—That a general submission, containing no restriction or stipulation to a contrary effect, constitutes the arbitrators final judges of both law and fact, has been stated to be settled law, at least in Massachusetts and New Hampshire.<sup>2</sup> If the parties, it was said, in "general terms submit their respective rights depending upon considerations of law and fact, and the referees decide accordingly, such award is conclusive as well of the law as the fact; and the court upon the return of such an award will not inquire whether the referees, thus authorized, have decided correctly upon principles of law or not."<sup>3</sup>

An action was referred to referees, who reported in favor of the defendant. The plaintiff moved to set aside the report on the ground of a mistake in law, and introduced testimony of a referee to the effect that the referees intended to decide "according to their views of the law of the case." In refusing to grant the motion, the court said that if the parties agree that the award shall be made agreeably to legal principles, it will be set aside for a mistake in law. But if the submission em-

<sup>1</sup> *Sharman v. Bell*, 5 Maule & Selw. 504.

<sup>2</sup> *Rundell v. La Fleur*, 6 Allen, 480; *Smith v. Boston & Maine Railroad Company*, 16 Gray, 521; *Bigelow v. Newell*, 10 Pick. 348; *White Mountains Railroad v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 id. 286. So held also in *Young v. Walter*, 9 Ves. Jr. 364.

<sup>3</sup> *Per Shaw, C. J.*, in *Bigelow v. Newell*, 10 Pick. 348, 355.

body no such restriction, "the arbitrators are constituted judges of the law as well as of the facts; and their decisions upon any question of law that may arise in the course of the trial, . . . which has been discussed by the parties before them, and has been deliberately considered and decided by them, is final and conclusive in the cause and between the parties to it. No court will revise their decision, where they have fairly exercised their judgment upon the question submitted to them; and their award will not be set aside, however different the decision upon the law may be from the opinions entertained by the court." It is added, that "this narrows the exception on account of mistake of law to the case of a reference limited to legal principles, or of some error in relation to a point not discussed or decided by the arbitrators, but assumed by them, by which they have in fact been prevented from exercising their judgment upon the real question submitted to them."<sup>1</sup> This last point, concerning the necessity of an actual consideration of a question, has been taken in other cases decided in New Hampshire;<sup>2</sup> but, at least so far as I have discovered, it is not embodied in the adjudications of any other court, unless, perhaps, by remote implication, in the case of *Myers v. York & Cumberland Railroad Company*.<sup>3</sup> This case is authority for saying that where it does not appear whether or not the question was in fact raised before the referee, it will be enough that it might have been so raised, and the presumption will be that it in fact was, and that he decided it.

**Cases establishing the Finality of the Arbitrator's Finding in matter of Law.** — Sutherland, J., said that where an action was referred to arbitrators by the mere act of the parties, *without being made a rule of court*, it is no ground of objection to their award, in an action to enforce it, that it is against law.

<sup>1</sup> *White Mountains Railroad v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 id. 286.

<sup>2</sup> *Cushman v. Wooster*, 45 N. H. 410; *Beane v. Wendell*, 22 id. 582; *Greenough v. Rolfe*, 4 id. 357.

<sup>3</sup> 2 *Curtis*, C. C. 28; and see *Roosevelt v. Thurman*, 1 Johns. Chy. 220, 226.

Whether or not if there be a rule of court a different principle would have been asserted is left to be inferred.<sup>1</sup> It has been already intimated, in discussing the question of the admission of legally incompetent evidence before a referee, that, if he is merely an officer of the court, it would seem reasonable that he should be governed by legal rules. Yet it must be confessed that the authorities do not seem to favor this view. And in Vermont it is held that where a case is referred by a general rule of reference, no questions of law are before the court, except such as are saved by the referees.<sup>2</sup>

An action by a London apothecary for his bill of charges was referred. Affidavits were offered to show that the arbitrator had allowed certain items which a London apothecary could not legally charge or collect. The court said: "The award is conclusive, there being nothing on the face of it to warrant the objection; affidavits cannot be received to show what particular charges have been allowed."<sup>3</sup>

And the court, in another case, refused to grant a rule to set aside an award, on the ground that the arbitrator had improperly treated as a penalty what was really stipulated damages, the mistake not appearing on the face of the award. Wilde, C. J., said that the parties "having obtained the decision of the tribunal which they themselves had chosen, had but little ground of complaint if its judgment did happen to be erroneous." Maule, J., remarked that "it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law."<sup>4</sup>

Courts will interfere in case of a mistake in law only if it be apparent upon the submission or award that the arbitrators were bound or intended to decide according to law.<sup>5</sup>

An important English case is as follows: In an action of

<sup>1</sup> *Mitchell v. Bush*, 7 Cow. 185.

<sup>2</sup> *Spear v. Stacy*, 26 Vt. 61.

<sup>3</sup> *Gensham v. Germain*, 11 Moore, 1.

<sup>4</sup> *Fuller v. Fenwick*, 3 C. B. 705.

<sup>5</sup> *Bell v. Price*, 2 Zab. 578.

debt the defendant's attorney agreed to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed before the arbitrator a sum for extra work occasioned by the defendant's breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The claim was objected to on the ground that it could not be included in an action of this nature, and was therefore not within the authority of the arbitrator; but the arbitrator entertained it, and awarded to the plaintiff a sum in respect of it. Baron Alderson, concurring with Chief Baron Pollock, said: "I was at first struck by the argument, that the extent of the arbitrator's jurisdiction could not be interpreted by his own judgment; and I still think so. But here the arbitrator had a general jurisdiction over the matter, because the reference was of the plaintiff's "claims in the action," and the plaintiff claimed this amount of damage as a *debt*. He may be wrong in his view, and the arbitrator also wrong in taking it into consideration; but when the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a judge, for the purpose of being allowed to revoke the submission. . . . But the defendants, though they find the arbitrator going on, do not interpose, but make the question one for his determination, and he has determined it. The extent of the arbitrator's jurisdiction is to be taken according to the plain words of the submission, namely, of the "claims" which the plaintiff makes in the action, and this is one."<sup>1</sup>

If an arbitrator is "silent as to his law," it cannot be inquired into.<sup>2</sup>

**Exception to the Broad Principle, in matter of Law.**—But though the broad principle is that the decision of the arbitra-

<sup>1</sup> *Faviell v. Eastern Counties Railway Company*, 2 Exch. 344. A case not unlike this is furnished by the Massachusetts Reports; *Rundell v. La Fleur*, 6 Allen, 480.

<sup>2</sup> *Boutillier v. Thick*, 1 Dowl. & Ry. 366.

tor is final, yet it is a principle which in its application is subject to some well-established exceptions. These occur more especially where the alleged mistake is of the law than where it is of fact. For "in matters of law it is considered that the court has a larger jurisdiction."<sup>1</sup>

**The Exception covers two Classes of Cases.** — The cases in which a mistake in law by the arbitrator will render his award void may be divided into two classes: 1. Where the parties themselves in their submission stipulate and require that the hearing shall be conducted, or that the decision shall be made, in conformity with the rules and principles of law; 2. Where the arbitrators themselves, either by the shape in which they make their award, or by embodying in it a statement of the grounds of their decision, or of their intention to be governed by legal principles, have conferred upon the court a power of inquiry and revision which it would not otherwise have had.

**Insertion of Restriction in the Submission.** — With regard to the first of these classes it is admitted in all the cases that it is perfectly competent for the parties to embody in their submission a valid limitation or restriction requiring the arbitrators to proceed and decide according to law.<sup>2</sup>

The arbitrators will then be obliged at least to try to do so. Whether or not, if they fail, their award is void by reason of their failure is a question in the determination of which a nice distinction must be observed. This distinction lies between the effort and success, and is exemplified by the following case. The submission stipulated that "the said referees are to determine all questions according to the rules of law and equity, the same as though the matter was to be tried in a court of law or equity." In placing a construction upon

<sup>1</sup> *Fairchild v. Adams*, 11 Cush. 547.

<sup>2</sup> *Johnson v. Noble*, 13 N. H. 286; *White Mountains Railroad v. Beane*, 39 id. 107; *Kleine v. Catara*, 2 Gall. 61; *Walker v. Sanborn*, 8 Greenl. 288; *Brown v. Clay*, 31 Maine, 518; *Commonwealth v. City of Roxbury*, 9 Gray, 451; also many other of the cases cited in the discussion of this topic recognize, at least incidentally or inferentially, the existence of the same principle.



this clause, the court said, "one of the principal questions made in the case is, whether this clause is to be interpreted as a limitation of the power of the arbitrators, or whether it is merely directory. If it is directory, it leaves them to be the ultimate judges as to how the matter would be tried in a court of law or equity, and thus makes their decision final and conclusive, as the parties agree it shall be. But if it is a limitation of their power, then the award is not final and conclusive; but this court is the ultimate tribunal to decide how the principal questions ought to be settled. It is an objection to this view that the only power thus left to this court is of a destructive character, in case of a disagreement with the arbitrators. We may destroy the award, but have no power to correct it."<sup>1</sup> Upon the strength of an earlier case in the same State this clause was apparently construed as directory. In that earlier case the submission was to the arbitrators to determine certain controversies, "always having regard to the legal rights of the parties." It was contended that the referees were only authorized to decide "according to the legal rights of the parties; and if they decided otherwise their award was void, and not conformable to their authority." Shaw, C. J., delivering the opinion, said, "The court are of opinion that this conclusion does not follow from the clause." This was "intended to prescribe a rule for the government of the referees as to the principles upon which they were called upon by the parties to decide, not as a limitation of their authority." The submission was very comprehensive and general, apparently designed to cover questions both of law and fact; and, in addition to this, the specific phrase above quoted "expressed the understanding of the parties, that the referees were not to go upon mere equitable and hypothetical claims or arbitrary grounds, but upon the respective existing vested legal rights. But it necessarily included an authority to inquire into and decide what those rights were,

<sup>1</sup> *Mickles v. Thayer*, 14 Allen, 114.

and of course to decide the questions of law upon which they depended.”<sup>1</sup>

The language of some of the cases has been so general, that it would seem to ignore the above-noted distinction, and to lay down a general rule that where the parties sufficiently indicate their intention, that the arbitrators shall be governed by legal rules and principles, a mistake in law will avoid the award. Judge Shaw neither states nor precludes the distinction. He simply says, in very comprehensive shape, that “if the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them, and decide accordingly. Then if it appears by the award to a court of competent jurisdiction that the arbitrators have decided contrary to law, — of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard, — the necessary conclusion is, that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, and is for that reason void. But when the parties have expressly, or by reasonable implication, submitted the questions of law as well as the questions of fact arising out of the matter of controversy, the decision of the arbitrators on both subjects is final.”<sup>2</sup>

A cause was submitted, with the stipulation that the referees should decide it “upon just and legal grounds.” The court said that the referees were restricted to decide according to law; that it must, therefore, be presumed that they intended to make the law their guide; and if they had mistaken the law, their report should be set aside.<sup>3</sup>

<sup>1</sup> *Bigelow v. Newell*, 10 Pick. 348.

<sup>2</sup> *Boston Water Power Company v. Gray*, 6 Metc. (Mass.) 131, 166.

<sup>3</sup> *Greenough v. Rolfe*, 4 N. H. 357.

When a submission was entered into by rule of court and agreement of parties, providing that the referee should determine both law and fact, "but subject to the review and final adjudication of all matters of law in the cause by the court;" the referee reported the facts, and found in favor of one of the parties. The court, accepting his finding of facts, but considering that his decision thereupon involved an erroneous ruling of law, rendered a judgment for the other party without recommending the award.<sup>1</sup>

A rule of reference empowered the arbitrator to award upon law and facts, "but subject to the review and final adjudication of all matters of law in the cause by the court." The court were of opinion that his decision was erroneous in point of law, and they ordered a judgment contrary to the award to be entered.<sup>2</sup>

If the statute under which the submission is entered into requires the court "to approve" the award, it is essential that the award shall be good in point of law.<sup>3</sup>

In *Estes v. Mansfield*,<sup>4</sup> an award was pleaded in bar. The parties in their submission had provided that the award should be "in accordance with the law." The arbitrators began by assuming the existence of a fact upon which they ought to have found; and then in lieu of making a proper application of the rule of law to such fact, if proved, they did precisely the opposite of what such proper application would have led them to do. "This was manifestly a gross mistake of law, which led the arbitrators to decide the case on a false issue. On well settled principles, the award is void."

**The Award may give the Court the Right to Interfere for a Mistake in Law.** — The second class of cases is where the basis for the interference of the court is furnished by the arbitrator

<sup>1</sup> *Commonwealth v. City of Roxbury*, 9 Gray, 451.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Allen v. Miles*, (*Smith's Administrator*) 4 Harrington, 234.

<sup>4</sup> 6 Allen, 69.

himself in the award. For an arbitrator, though empowered to decide finally upon matters of law as well as of fact, may refrain from fully exercising this power. He may either decline to decide at all, or he may decide and express his decision in such a manner that it will be considered to be reviewable. He declines to decide at all when he reports his finding of the facts, and raises the question of law to be determined by the court; or makes his award in the alternative, without expressing his own opinion as to the law. In cases of this nature it is obvious that he commits no mistake, since he takes no position, but remains wholly uncommitted to any view. If he finds the facts, expresses his opinion and decides accordingly, but declares that if in the case stated the law be otherwise, then his award shall be for the other party; he may make a mistake in his idea of the law, but the power of the court to rectify that error is, of course, unquestionable.

But a large number of cases remain in which the court assumes the power to review; and these are either where the arbitrator recites in his award the grounds of his decision, or where he states that he intended to decide according to law. The theory is that these two forms are equivalent, and that the setting forth of the grounds of decision is substantially a declaration that those grounds are assumed by the arbitrator to be good in law. Thus, in either case, is brought into operation the principle upon which interference is justified, to wit, that if the arbitrators intended to make their decision accord with sound principles of law, but were mistaken in those principles or in the application of them, then their decision is not, in fact, what they designed that it should be; it is not really their judgment in the cause, and for this reason it should be set aside.

To quote again from the opinion of Chief Justice Shaw: "Where it is manifest upon the award itself that the arbitrator intended to decide according to law, but has mistaken the law, then the award is set aside, because it is manifest that the

result does not conform to the real judgment of the arbitrator. For then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide ; and therefore, if such decision would be otherwise, it follows that he intended to decide the other way.”<sup>1</sup>

The same doctrine is asserted in the following opinion : “ If the referees, intending to decide according to law, mistake the law, and refer the same to the court for revision, either by an express reference or by stating specially the principles upon which they have acted, which raises a presumption of intention so to refer, the award will be set aside, . . . for the reason that in such case it is apparent that the award is not such as the referees intended to make.” “ The fair and impartial judgment of the referees is conclusive, both upon the law and the facts of the matters submitted and decided.”<sup>2</sup>

The English decisions proceed upon the same theory.<sup>3</sup>

An arbitrator delivered to the parties, together with his award, a paper containing observations on the evidence and his reasons for making the award. The court held that it was not necessary that the reasons should appear upon the award, since there could be no doubt what they were. It was “ evident that he meant to determine according to law, and he had mistaken it ; therefore the award is not such as he intended it to be.” “ He has gone wrong according to his own principles and view of the subject.” The award was set aside.<sup>4</sup>

**Statement by the Arbitrator of an Intention to be governed by Law.** — There seems to be no question that if the arbitrator distinctly asserts in his award his intention that his decision should accord with legal principles, the court will examine into

<sup>1</sup> *Boston Water Power Company v. Gray*, 6 Metc. (Mass.) 181, 168 ; *Ward v. American Bank*, 7 id. 486.

<sup>2</sup> *Johnson v. Noble*, 13 N. H. 286.

<sup>3</sup> *Kent v. Elstob*, 3 East, 18 ; and see *Young v. Walter*, 9 Ves. Jr. 364 ; *Broadhurst v. Darlington*, 2 Dowl. 38 ; *Russell on Arb.*, 3d ed. p. 295.

<sup>4</sup> *Kent v. Elstob*, 3 East, 18.

the soundness of his law, and set aside his award if he has fallen into mistake.

Where a referee recited in his report the facts and the grounds on which he had based his decision, stating that he considered that the plaintiff, "in a legal point of view," was not entitled to recover, the court said that it appeared that the referee intended to follow the law, and to decide upon the legal rights of the parties; that therefore the questions of law which arose upon the facts were properly open to the consideration and revision of the court, and, if the referee had made a mistake in the law, his report should be set aside.<sup>1</sup>

But where, upon a written statement of facts, the arbitrators reported that one party was "*legally entitled*" to a certain amount, their decision was held final, and not liable to be overhauled for a mistake of the law.<sup>2</sup>

In an affidavit annexed to his report, a referee said that he presented the facts in his report and his ruling thereon, "expecting that the court would review the questions there decided, and sustain or set aside the report as they might consider the questions of law decided by me right or wrong." The court said that "a plainer case could not well be stated;" the accuracy of the referee's law was left to be determined by the court, and if it were wrong his report could not be sustained.<sup>3</sup>

**The Decisions in Vermont.** — In the reports of Vermont, where a little eccentricity marks the decisions of the courts concerning this subject, something like a contradiction of this rule may be found. For example: Where referees concluded their report with the statement that "in all things they intended to decide according to law," Judge Redfield, remarking that it was becoming common for referees to conclude their reports in this shape, said that it could not be tolerated that this clause

<sup>1</sup> *Johns v. Stevens*, 3 Vt. 308.

<sup>2</sup> *Smith v. Thorndike*, 8 Greenl. 119.

<sup>3</sup> *Cushman v. Wooster*, 45 N. H. 410.

should have the effect, in every instance, of bringing the whole case before the court for a re-trial, to determine whether or not the referees had fallen into any error of law in the course of the proceedings. Previous cases<sup>1</sup> in the State, he said, had only established the principle that if referees adopt any rule of action, whether law, equity, or arithmetic, and so fail in its application as to come to a different result from that to which a correct application of their own rule of decision should have brought them, and this is clearly shown, then their report will not be accepted.<sup>2</sup>

**Statement of Grounds, &c., of Decision in the Award.**—But the matter of whether or not a mere statement, embodied in their award by the arbitrators, of the principles, grounds, or theory upon which they have based their decision, is entitled to have the operation of referring the legal soundness of those principles to the court for examination, is by no means well settled.

Judge Story says that in all cases in which the referees specially state the principles or reasons upon which they have acted or based their decision, the presumption is that they intended to decide according to law, and refer it to the court to review their decision; and in this case it was held that since the referees had expressly laid the grounds of their decision before the court, the accuracy of these grounds was submitted for consideration, the question of whether or not a mistake in law had been committed must be inquired into, and if such mistake should appear, then the award would be avoided.<sup>3</sup>

Judge Shaw laid down the general principle as follows: "But it is argued that if the arbitrators state the grounds of their award simply and without expressing the contrary, it is to be presumed that they do mean to submit those grounds to

<sup>1</sup> *Johns v. Stevens*, 8 Vt. 308; *Hazeltine v. Smith*, ib. 535.

<sup>2</sup> *Learned v. Bellows*, 8 Vt. 79.

<sup>3</sup> *Kleine v. Catara*, 2 Gall. 61; and see *Greenough v. Rolfe*, 4 N. H. 357; *Cushman v. Wooster*, 45 id. 410; *Johnson v. Noble*, 13 id. 286; *Learned v. Bellows*, 8 Vt. 79.

the court. This is to be taken with some qualification. If they state the grounds of their decision avowedly for the satisfaction of the parties, or one of them,<sup>1</sup> and it distinctly appears that they do not intend to submit their conclusions as matter of law to the court, then the award is conclusive. The question is as to the intent of the arbitrators. Perhaps, where they say nothing in regard to their intent, the presumption is that they intend to say, 'These are the grounds of our award; if they are right in point of law, we think the award is right, but we submit the question to the court.' In such case the court might revise and set aside the award, if it were found not to be well grounded in point of law, because it would not then be the award which the arbitrators intended to make."<sup>2</sup>

The doctrine that an award is to be set aside "where it is manifest upon the award that the arbitrator intended to decide according to law, but has mistaken the law, . . . has been supposed," says Judge Dewey, "to open awards where the report of the arbitrators has presented on its face the full grounds of the making the award for supervision, and many cases may be found of its recognition. This proposition assumes that the error is manifest on the award itself; and, as it seems to us, it must be taken with the qualification that the award so clearly indicates the purpose of the arbitrator to decide by the strict rules of law that it justifies the judicial mind in supposing that the arbitrator would have made a different award, had he known that the judicial tribunals held a different view of the questions of law arising in the case from those entertained by himself."<sup>3</sup>

Where a referee in his report stated the grounds of his decision, without adding that he intended to decide the case according to the strict rules of law, Judge Redfield held that no question could be raised in regard to any question of law

<sup>1</sup> See *Smith v. Boston & Maine Railroad*, 16 Gray, 521.

<sup>2</sup> *Fairchild v. Adams*, 11 Cush. 547; *Smith v. Boston & Maine R.R. Co.*, 16 Gray, 521.

<sup>3</sup> *Smith v. Boston & Maine Railroad*, 16 Gray, 521.



decided by the referee, adding, certainly either in defiance or in ignorance of many authorities, that "no rule of law is perhaps better settled than this."<sup>1</sup>

An important point is made in the case of *Smith v. Boston and Maine Railroad*.<sup>2</sup> A complete award was made, and then a supplemental paper was signed by the arbitrators, in these words: "A statement of the facts and principles upon which the foregoing award is made is, at the request of the said S., hereto annexed, signed by the said arbitrators, and to be taken as a part of said award." Laying aside for the time the question of whether or not this document could be treated as a part of the award, "taking the view of it most favorable for the petitioner, as to its being properly before the court with the award," it was said that Massachusetts cases certainly furnished precedents for inquiring into the correctness of the law, on the doctrine that the statement of the principles should be presumed to be a submission of their accuracy to the court. But, said Judge Dewey, "it is to be remembered that this presumption, thus spoken of as arising from the arbitrators making a statement to the court, was a presumption authorized to be made in a case not like the one before the court, but the case of an award founded on a submission by a rule of court, and returnable to a court to enter judgment on the award. . . . This presumption is, in the present case, fully rebutted by the fact that this was a submission *in pais*, making these arbitrators the highest tribunal to act upon the question. The award was not to be returned to any court. The case furnishes no ground for supposing that these arbitrators meant to say, 'We think the award is right in point of law, but we submit the question to the court,' as was suggested might be the case in *Fairchild v. Adams*.<sup>3</sup> . . . To whom was the report of the facts and law to go for an appellate judgment? . . . The arbitrators

<sup>1</sup> *Cutting v. Stone*, 23 Vt. 571.

<sup>2</sup> 16 Gray, 521.

<sup>3</sup> *Ante*, p. 308.

undoubtedly intended to give publicity to their reasons for the award they had made, holding themselves responsible as men of intelligence and learning in the matter submitted to them. But there must be something beyond this to establish the position that they made this supplement to their award in order that it might appear whether they had decided according to law. It must appear that they made the statement for the purpose that their award might be inoperative if it appeared that they had not decided according to law as held by judicial tribunals. For aught that appears, this board of arbitrators intended to make an award based upon their own views of the law and facts of the case, irrespectively of the law of the books."<sup>1</sup>

**The Rule in this Matter in England.**—The older rule in England has been that where the arbitrator stated his grounds and reasons in his award, the matter of whether or not these were good in law would be examined by the court, and the award would be set aside if these were not good in law.<sup>2</sup> "Possibly, however," says Russell, "in many cases where the report does not give the submission, the arbitrator may have been authorized to state a case for the decision of the court."<sup>3</sup> From which remark it might be inferred that this writer does not approve of the rule. Yet he adduces only one instance of a contrary adjudication, where the Court of Queen's Bench refused to consider the validity of the legal principles on which the arbitrators had proceeded, since there was no authority conferred upon the arbitrators to submit a point of law for review. It was said that every thing subsequent to the actual decision of the arbitrators was "inoperative and surplusage, and need not be regarded."<sup>4</sup>

<sup>1</sup> *Smith v. Boston & Maine Railroad*, 16 Gray, 521.

<sup>2</sup> *Pratt v. Hillman*, 4 Barn. & Cr. 269; *Williams v. Jones*, 5 Man. & Ry. 3; *Ames v. Milward*, 8 Taunt. 637; *Gaby v. Wilts Canal Company*, 3 Maule & S. 580; *Kent v. Elstob*, 3 East, 18; and see *Fuller v. Fenwick*, 3 C. B. 705; *Toby v. Lovibond*, 17 L. J. C. P. 201.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 304.

<sup>4</sup> *In re Wright & Cromford Canal Company*, 1 Q. B. 98.

**Suggestion of a Distinction.**—It is suggested that a sound distinction might be drawn between the statement of the mere grounds or reasons of a decision and the enunciation of a supposed legal principle, as such. For though an arbitrator's reasons may be bad in law, yet his award may well be allowed to stand in spite of it, since he has a right to disregard strict law and pursue a broad and substantial justice, and *non constat* that he has not intended to do so. But if he states what he conceives to be a legal principle, as having governed his action in the premises, it is fair to say that if that legal principle is wrong, then he has been so far misled that his award is not in fact entitled to be regarded as his judgment in the controversy. It seems to me that there may be something in this view, though I have nowhere found it mentioned in any argument or judicial opinion, unless, perhaps, it is distantly hinted at by Judge Dewey. In a sort of supplemental instrument the arbitrators had set forth the "facts and principles" upon which they had made their award. Counsel wished to make this a basis for reviewing the law, and propositions necessary to be maintained by him were, of course, that the arbitrators intended to decide according to law, and that they had stated the law and facts in their award, in order that it might appear whether or not they had executed that intent. Yet the only proof of the first proposition lay in the second proposition. There was no proof of intent to decide according to law, unless the statement of facts and principles was such. "Now," said Judge Dewey, "it might be asked, where is the evidence that they intended to decide according to the principles of law rather than equity and substantial justice between the parties? Or where is the evidence that they intended to base their award upon any other legal opinions than their own?"<sup>1</sup>

**Effect of a Recital of Facts in the Award.**—If the arbitrator, not being empowered to state facts in order to raise an issue of law for the court, simply recites his finding of the facts, and

<sup>1</sup> Smith v. Boston & Maine Railroad, 16 Gray, 521.

then makes his decision, without connecting the two by any declaration of his reasons, views, or opinions, the English rule is that the award will be sustained. The court will not draw its own conclusion from the facts stated, and, if this be different from the conclusion of the arbitrator, then vacate his award.<sup>1</sup>

In one instance the court remarked that the facts stated were not set forth as the full evidence in the cause, but the mere impression of the evidence which the arbitrator had received.<sup>2</sup>

Moreover, it has been said the court will not presume that there were no other facts to warrant the award, save only those which the arbitrator has set forth in it. His finding of a particular fact does not show that he made it the ground of his decision. He may have made only a partial statement, desiring for some reason to state some particular fact.<sup>3</sup>

If the facts recited present any evidence which a judge would be justified in leaving to a jury, as going to make out such a conclusion as the arbitrator has come to, the court will not interfere, though they might have come to a different conclusion. The court has no such control over an arbitrator as it has over a jury in the case of an apparently wrong conclusion.<sup>4</sup> His statement that he finds some specific fact, as, in the case cited, the existence of a partnership, though it appear to be the ground of his decision, may often be wholly supererogatory, or beside the question, and will then be treated simply as surplusage, and not allowed to vitiate the award.<sup>5</sup>

**The Statement of Grounds, &c., must constitute a Part of the Award.** — It seems that the statement of grounds or principles should be embodied in the report or award itself, or in an in-

<sup>1</sup> *Archer v. Owen*, 9 Dowl. 341; *Barton v. Ransom*, 3 Mee. & W. 322; *Bradbee v. Christ's Hospital*, 4 Man. & Gr. 714, p. 757; *Scott v. Van Sandau*, 6 Q. B. 237.

<sup>2</sup> *Archer v. Owen*, 9 Dowl. 341.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 305; *Lancaster v. Hemington*, 4 Ad. & El. 345; *Teale v. Younge, M'Lel. & Y.* 497.

<sup>4</sup> *Barrett v. Wilson*, 1 Cr. Mee. & Ros. 586; 3 Dowl. 220; *Archer v. Owen*, 9 id. 341.

<sup>5</sup> *Harrison v. Lay*, 13 C. B. n. s. 528; *Bradbee v. Christ's Hospital*, 4 Man. & Gr. 714, p. 757.

strument properly made a part of the report or award.<sup>1</sup> At the request of counsel, a referee put into writing an exposition of the views and considerations upon which he had founded his award. But since it was no part of the award, and not referred to in it, the court refused to give it any consideration.<sup>2</sup>

At the request of a party, a referee, who had made a complete award, made a subsequent separate report of the evidence, stating that he had no intention of thereby submitting the matters arbitrated to the revision of the court, unless the party was legally entitled to such revision independently of this proceeding. The court refused to inquire into the legality of the decision upon the strength of this instrument.<sup>3</sup>

But the old English cases tend to show that if the arbitrator annexes any explanatory instrument,<sup>4</sup> or even writes a letter,<sup>5</sup> setting forth the grounds of his decision, and these be bad, and would, if established, furnish a sufficient cause for vacating the award, the court will take notice of these extrinsic documents, and will set aside the award, as if the objectionable matter had been embodied in it.

**The Fundamental Matter is the Arbitrator's Intent.** — It is evident from the preceding pages that the fundamental fact to be established is the intention of the arbitrators to decide according to law, and the difficult questions chiefly relate to the matter of what shall be considered sufficient or conclusive evidence to establish this intent. It appears, however, that the necessity for such evidence may be superseded by the admission of the parties. Where, in the argument of the cause, the counsel upon both sides proceeded upon the assumption that

<sup>1</sup> *Smith v. Boston & Maine Railroad*, 16 Gray, 521; *Cushman v. Wooster*, 45 N. H. 410; *Ward v. American Bank*, 7 Metc. (Mass.) 486.

<sup>2</sup> *Brown v. Clay*, 31 Maine, 518.

<sup>3</sup> *Ward v. American Bank*, 7 Metc. (Mass.) 486.

<sup>4</sup> *Kent v. Elstob*, 3 East, 18; *Sharman v. Bell*, 5 Maule & S. 504; *Holmes v. Higgins*, 1 Barn. & Cr. 74; *Pratt v. Hillman*, 4 id. 269.

<sup>5</sup> *The Ayre & Calder Navigation Case*, cited in *Williams v. Jones*, 5 Man. & Ry. 3.

the arbitrators intended to be governed in their determination by the rules of law, the court said that the award could probably be examined into, and its legality be considered by a court of law, when it was pleaded in bar to an action.<sup>1</sup>

**Error in a Fundamental and Clear Principle of Law.** — Some of the English cases support a doctrine substantially as follows: that if the arbitrator is declared to have adopted some erroneous fundamental principle, upon which he has proceeded in investigating the case, and in coming to a determination, and making his award in the controversy, the courts may inquire into the matter with the purpose of vacating the award if they find that he has in fact fallen into the alleged mistake.<sup>2</sup> For example, a suit by an attorney for a bill not taxable was referred to the clerk of assize; the Court of Exchequer considered that they had the power to examine whether the arbitrator had adopted the right rule of taxation.<sup>3</sup> But it was said in *Corneforth v. Geer* that the mistake must be a plain one; and again it was said that if the point of law were a doubtful one, the Court of Chancery would give no relief against the arbitrator's decision.<sup>4</sup>

And still another holds that if the error in law is in a point "universally known and clear," then the decision is "plainly and grossly against law," and is bad. But if the point "might be doubtful," then the award shall stand.<sup>5</sup>

**Awards on Questions of Pure Law.** — Questions of pure law are sometimes directly submitted. In such cases it makes no difference whether or not the arbitrators decide them as the court would see fit to do. The award, whether it meets the approbation of the court or not, is final and conclusive. The

<sup>1</sup> *United States v. Ames*, 1 Woodb. & Min. 76.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 294; *Hardy v. Innes*, 6 Moore, 574; *Johnson v. Durant*, 2 Barn. & Ad. 925; *Corneforth v. Geer*, 2 Vern. 705; *Anon.*, 3 Atk. 644; *Richardson v. Nourse*, 2 Barn. & Ald. 237.

<sup>3</sup> *Broadhurst v. Darlington*, 2 Dowl. 38.

<sup>4</sup> *Ridout v. Pain*, 3 Atk. 486; 1 Ves. 11.

<sup>5</sup> *Cleary v. Coor*, 1 Hayw. (N. Car.) 225; see also *Morris v. Ross*, 2 Hen. & Munf. 408.

agreement of the parties is, substantially, that they will be bound by whatever the arbitrator declares to be the law between them, and by this agreement they are bound.<sup>1</sup>

**Distinctions between Professional and Non-Professional Arbitrators.** — It has sometimes been made a question whether the court will not set aside an award, on the ground of mistake of the law, when the arbitrator is not a professional man, and decline inquiry into such mistake when he was understood from his profession to be well acquainted with the law. In the courts of law in England some of the earlier cases countenanced this distinction.<sup>2</sup> But it never was adopted by equity tribunals,<sup>3</sup> and it can no longer be considered to exist.<sup>4</sup> Chief Justice Shaw surmises that it was probably originally “taken rather by way of instance to illustrate the position that, when the parties intended to submit the questions of law as well as of fact, the award should be final, but otherwise not.” In another case, speaking of the same old doctrine, he says, “But what does this mean? Simply that it is supposed to be intended that the case shall be decided according to law. And do they not intend this in all cases? The rule [of court] refers contested questions of right to arbitrators; and what are any questions of right but questions of fact first, and then of the rules of law applicable to the facts?”<sup>5</sup>

**Matters of Fact are peculiarly within the Arbitrator's Authority.**

<sup>1</sup> *Greenough v. Rolfe*, 4 N. H. 357; *Smith v. Smith*, 4 Rand. 95; *Kleine v. Catara*, 2 Gall. 61; *Jackson v. Ambler*, 14 Johns. 96; *Cranston v. Kenny's Executors*, 9 id. 212; *Campbell v. Western*, 3 Paige, 124; *Ching v. Ching*, 6 Ves. Jr. 281; *Young v. Walter*, 9 id. 364 (*per* Lord Chancellor Eldon); *Steff v. Andrews*, 2 Madd. 6; *Price v. Hollis*, 1 Maule & S. 105.

<sup>2</sup> *Chace v. Westmore*, 13 East, 356; *Sharman v. Bell*, 5 Maule & S. 504; *Perriman v. Steggall*, 9 Bing. 679; *Cramp v. Symons*, 1 id. 104; *Williams v. Jones*, 5 Man. & Ry. 3.

<sup>3</sup> *Ching v. Ching*, 6 Ves. Jr. 281; *Steff v. Andrews*, 2 Madd. 6.

<sup>4</sup> *Fuller v. Fenwick*, 3 C. B. 705; *Brown v. Croyden Canal Co.*, 9 Ad. & E. 522; *Ashton v. Poynter*, 3 Dowl. 201; *Jupp v. Grayson*, ib. 199; *Huntig v. Ralling*, 8 id. 879; *Boston Water Power Company v. Gray*, 6 Metc. (Mass.) 131; *Ward v. American Bank*, 7 id. 486.

<sup>5</sup> *Fairchild v. Adams*, 11 Cush. 547.

— Less hesitation has been manifested in treating as conclusive the finding of arbitrators upon facts than their rulings upon principles of law. Matters of fact are regarded as peculiarly within the scope of their authority. The absence of technicality leaves no room for questioning the accuracy of their knowledge. As intelligent men they judge of the facts and merits finally, as a jury does. The department is peculiarly their own. That their discretion and judgment upon all questions of fact or merits are absolutely final, and not subject to review or examination, is a leading principle often enunciated, and nearly, though not quite, universally accepted in the law concerning arbitration.<sup>1</sup> Chief Justice Shaw says, "It has long since been settled that awards are conclusive on all matters of fact submitted to the arbitrators."<sup>2</sup>

**Exception where the Judgment has been prevented from being fairly or correctly exercised.**— It might seem that there is a great number of cases in which this rule has been set at naught, yet a careful examination will show that a large proportion of these are covered by one grand principle, which ought rather to be regarded as constituting a development of the rule than an exception to it. The rule is that the *judgment* of the referees or arbitrators upon a question of fact is conclusive. The development or exception, whichever it may be called, requires that this judgment should be the real discretion, fairly exercised, of the persons selected to judge. If fraud or corruption intervene, the *decision* will not be the *judgment*. This matter is treated of elsewhere. No less evident is it that if a supposition of fact upon which the arbitrators have acted should turn out to be false, the conclusion to which they

<sup>1</sup> Boston Water Power Company v. Gray, 6 Metc. (Mass.) 181; Weston v. Stuart, 2 Fairf. 326; Goldsmith's Administrator v. Tilly, 1 Harris & J. 361; De Long v. Stanton, 9 Johns. 88; and see *ante*, p. 294, notes 1 & 2; Morgan v. Mather, 2 Ves. 17; Dick v. Milligan, *ib.* 23; Baggalay v. Mackwick, 30 L. J. C. P. 342; 10 C. B. N. s. 61; Winter v. Lethbridge, 13 Price, 533; Brown v. Brown, 1 Vern. 157; Lancaster v. Hemington, 4 Ad. & El. 345; Boutillier v. Thick, 1 Dowl. & Ry. 366; Hill v. Ball, 1 Dow, N. s. 164.

<sup>2</sup> Fairchild v. Adams, 11 Cush. 547.



have come upon this erroneous basis will be so far perverted that it will not represent their true discretion or judgment in the matter. To illustrate by an example: If arbitrators are called upon to make an appraisal of land, and are obliged as a preliminary step to determine its measurement and contents, if they use a measure which is, without their knowledge, imperfect, — as, if they use a chain from which a link is missing, — they will make a mistake in fact which will destroy the accuracy of their conclusion. Upon a mistaken basis they cannot build a decision which truly expresses their judgment or discretion. The mistake is in a matter of fact; but it is a matter of fact in respect of which no judgment or discretion has been exercised, for the arbitrators have not inquired into and passed upon the accuracy of the chain; they have erroneously taken it for granted. Still more simple is the case of an error in calculation, obvious on the face of the award itself.

I do not know that I can do better than here again to quote from the opinion of Chief Justice Shaw.<sup>1</sup> “Another ground,” he says, “for setting aside the award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle stated in the preceding proposition, that the award does not conform to the judgment of the arbitrators, and the mistake apparent in some material and important particular shows that the result is not the true judgment of the arbitrators. The mistake must be, therefore, of such a nature, so affecting the principles upon which the award is based, that if it had been reasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result. A familiar instance of this class of mistakes is an obvious error in computation, by which the apparent result, in sums or times, or other things of like kind, is manifestly erroneous.<sup>2</sup> In such case it is clear that the result stated is

<sup>1</sup> *Boston Water Power Company v. Gray*, 6 Metc. (Mass.) 131.

<sup>2</sup> To the same effect is the opinion of Judge Story, in *Kleine v. Catara*, 2 Gall.

not that intended ; it does not express the real judgment of the arbitrators."

Errors in matters of fact, misleading the judgment of the arbitrators, may also occur in the course of the proceedings, without, however, being "apparent upon the award itself." Thus it may happen that the "arbitrators make a mistake in matter of fact by which they are led to a false result. This would not extend to a case where the arbitrators come to a conclusion of fact erroneously, upon evidence submitted to and considered by them, although the party impeaching the award should propose to demonstrate that the inference was wrong. This would be the result of reasoning and judgment upon facts and circumstances known and understood ; therefore a result which, upon the principles stated, must be deemed conclusive. But the mistake must be of some fact, inadvertently assumed and believed, which can now be shown not to have been as so assumed ; and the principal illustration [is] that of using a false weight or measure believing it to be correct. Suppose, as a further illustration, that a compass had been used to ascertain the bearings of points, and it should be afterwards found that by accident or the fraud of a party a magnet had been so placed as to disturb the action of the needle, and this wholly unknown to the arbitrators ; it is not a fact, or the inference of a fact, upon which any judgment or skill had been exercised, but a pure mistake, by which their judgment, as well as the needle, had been swerved from the true direction which it would have taken had it followed the true law understood to govern it. One test of such a mistake is that it is of such a kind, and so obvious, that when brought to the notice of the arbitrators, it would induce them to alter the result to which they had come in the particular specified. It is not to be understood that such mistake can be proved only by the testi-

61. He says that for an error in fact, *e. g.* of miscalculation, apparent on the face of the award, or where the referees are satisfied of the existence of an error, and wish to correct it, the court will recommit the award to receive the correction, but will not set it aside.

mony or by the admission of the arbitrators. They may, from various causes, be unable to testify, or may not be able to recollect the facts and circumstances sufficiently. It is not, therefore, as matter of law, confined to a case of mistake admitted or proved by the arbitrators; but it must be of a fact upon which the judgment of the arbitrators has not passed as a part of their judicial investigation, and one of such a nature, and so proved, as to lead to a reasonable belief that they were misled and deceived by it, and that, if they had known the truth, they would have come to a different result."

The accident or mistake by reason of which an award may be impeached is, at a later stage in the opinion, said to be one of such a nature that by it the arbitrators "were deceived and misled, so that the award is not, in fact, the result of their judgment. In a certain loose sense, the arbitrators may be said to have fallen into an error or mistake, a palpable mistake, when they have judged wrong upon the evidence before them. This is not the kind of error or mistake intended, because, so far as they have exercised their judgment, it is conclusive, though the result might, to other minds, seem palpably erroneous. . . . The mistake or accident, therefore, must be of some fact which deceived and misled the arbitrators, and not a mistake in drawing conclusions of fact from evidence or observation, or mistake in adopting erroneous rules of law or theories of philosophy." The illustration of the compass is again referred to. If the action of the needle be disturbed by an accidental cause unknown to the arbitrators, their award made in reliance upon its accuracy may be avoided. But if they "adopted a theory of magnetism in relation to the variation" of the needle which "other philosophers, conversant with all that is known of the science of magnetism," consider incorrect, yet the testimony of these other philosophers is inadmissible to controvert the award, because it "would be an appeal from [the arbitrators'] decision in a case where they have exercised their judgment." So if arbitrators use loga-

rithms incorrectly calculated, "it would be a mistake that misled them. But if they adopted, purposely and deliberately, a process of mathematical reasoning which they believed to be correct, their award could not be impugned by the testimony of other mathematicians tending to show that it was erroneous."

**Mistake of an Arbitrator as to Contents of Award.** — It was offered to show by testimony of an arbitrator that he had joined in the execution of the award, without reading it, under a misapprehension of its contents. For that he thought the judgment which had been agreed upon was materially different from that which his associates understood it to be and had expressed in drawing up the award. Chief Justice Shaw said that this was "not such a mistake as would avoid an award. It would go to show, not that the arbitrators together, as a body, had been misled by the use of any false token or measure, or table of computations, or the like, to make an award which was not the result of their judgment upon the facts found by them, as in *Boston Water Power Company v. Gray*.<sup>1</sup> It would simply tend to show that one of the arbitrators misunderstood the other two, or they him, in reference to the supposed item. It would be hazardous in the extreme to admit such an alleged mistake, long after an award is made and acted upon, to impeach its validity."<sup>2</sup>

**The General Doctrine that a Mistake is Ground for vacating an Award.** — The second of the two grand classes of cases mentioned heretofore<sup>3</sup> is now reached. They may be said, in a word, to lay down a doctrine precisely opposite to that enunciated upon page 294, *ante*, and supported by so many high authorities. The only consistent principle which can be extracted is that an award may be set aside for a mistake in law or in fact, provided the circumstances are such that the court thinks it best or proper to do so. It is needless to dilate upon the mischief wrought by such a rule. In one or another

<sup>1</sup> 6 Metc. (Mass.) 131.

<sup>2</sup> *Withington v. Warren*, 10 id. 431.

<sup>3</sup> *Ante*, p. 292, "Two Classes of Decisions."

special instance it may work a substantial equity between the parties which the rigid doctrine of conclusiveness would render impossible. But it is obvious that it would introduce such a degree of uncertainty and want of finality into the whole system of settling disputes by arbitration as to deprive that method of the greatest portion of its value. In addition to this intrinsic weakness of this doctrine, it will be remarked that the great proportion of the tribunals by which it has been asserted in the United States are not usually regarded as constituting very high professional authorities. The adjudications of those courts which are entitled to more respect are old, and are based upon the English authorities. Both in this country and in England the current of the law has been carrying us away from these antiquated positions, and their age must be regarded as an element of weakness, rather than as a token of the strength pertaining to a long-established doctrine. Russell says that greater latitude was allowed formerly in reviewing the arbitrator's judgment than the courts would be disposed to permit at present ;<sup>1</sup> and the same statement also unquestionably represents correctly the tendency in the United States.

Relief against an award will be granted in equity if a "plain error in law or fact" be specifically set forth and proved.<sup>2</sup> An award will be set aside for a mistake palpable upon its face ;<sup>3</sup> or for a plain mistake in the law upon some material point ;<sup>4</sup> or for a mistake in fact such as the arbitrator himself would admit, *e. g.* a miscalculation ;<sup>5</sup> or for a palpable mistake which is extremely prejudicial to the losing party ;<sup>6</sup> for a very gross or manifest mistake.<sup>7</sup> Though in Illinois, where the same lax rule is recognized, it is nevertheless subject to the limitation

<sup>1</sup> Russell on Arb., 3d ed. p. 293.

<sup>2</sup> Williams v. Paschall, 4 Dall. 285 (*per* Shippen, C. J.)

<sup>3</sup> Morris v. Ross, 2 Hen. & Munf. 408.

<sup>4</sup> Hartshorne v. Cuttrel, 1 Green's Chy. 297.]

<sup>5</sup> Ibid.

<sup>6</sup> Bumpass v. Webb, 4 Porter, 65.

<sup>7</sup> Sumpter v. Murrell, 2 Bay, 450 ; Askew v. Kennedy, 1 Bailey, 46.

that the mistake must be that of all the arbitrators, not of a part only.<sup>1</sup>

A very bad case is that of *Cleaveland v. Dixon*, which allows an award to be set aside for an error in law or fact, apparent on its face, *provided* that it is in the nature of an error in the exercise of their discretion by the arbitrators.<sup>2</sup> But the judge was evidently so muddy in his ideas upon this subject that the cause is not likely to become a leading one.

A report of referees may be set aside either for an evident mistake in a matter of fact, or for an obvious error in matter of law.<sup>3</sup>

Other cases to the same general effect as the foregoing, as well as some of those already cited, add, as an essential stipulation, that the mistake must be apparent on the face of the award itself, so that no extrinsic inquiry or evidence is needed to establish it.<sup>4</sup>

Another case, acknowledging that an award may be vacated for an error in law, yet says that this will be done only if the error be apparent on the face of the award, and also if it was the evident means of leading the arbitrators to an erroneous conclusion.<sup>5</sup>

**The English Authorities supporting this Doctrine.**—Russell says that “The result of the numerous cases cited seems clearly to establish that though the courts could not interfere with the arbitrator’s decision on the simple ground that he had judged erroneously, yet where there was a *clear gross mistake* affecting the result of the award, and that admitted or made out to the satisfaction of the arbitrators (as to which Lord Thurlow insisted on having their affidavits) the courts both

<sup>1</sup> *Pulliam v. Pensoneau*, 33 Ill. 375.

<sup>2</sup> 4 J. J. Marsh. 226.

<sup>3</sup> *Williams v. Craig*, 1 Dall. 313 (*per* M’Kean, C. J.); *Lyle v. Clason*, 1 Caines, 323.

<sup>4</sup> *Pleasants v. Ross*, 1 Wash. 156; *Hartshorne v. Cuttrell*, 1 Green’s Chy. 297; *Brickhouse v. Hunter*, 4 Hen. & Munf. 363; *Goldsmith’s Administrator v. Tilly*, 1 Harris & J. 361; 3 Rand. 122.

<sup>5</sup> *Cohen v. Hobenicht*, 14 Richardson Eq. (S. Car.) 31.

of law and equity would, as a general rule not many years ago, have set aside the award."<sup>1</sup>

But, he continues, "whether this rule will be followed in equity at the present day is perhaps uncertain, as the courts of law are now evidently inclined to hold that an award good on its face is not to be impeached on the ground of mistake alone."<sup>2</sup>

It is, however, "clear that for an admitted mistake of the arbitrator a court of equity will refer back an award."<sup>3</sup>

**The Case of In re Hall & Hinds, and Comments upon it.** — A. claimed that B. owed to him two separate sums of money. The dispute was whether B. owed him both or only one of these sums. The arbitrators were of opinion that B. should pay both sums to A. But by a singular series of blunders, they deducted the less from the greater, instead of adding the two together; and instead of directing this erroneous balance to be paid by B. to A., they reversed the matter and ordered the payment to be made by A. to B. The mistake was obvious, and was even acknowledged in a formal affidavit made by the arbitrators and produced in court. In delivering his opinion, Tindal, C. J., laid great stress upon the manifest failure of justice which must ensue if the court could not relieve in this case, especially since no defence could apparently be made in a suit at law on the award. It would bring the administration of justice "into scandal and contempt," he said, if the remedy could not and should not be applied. This mistake was to be regarded as "a mere clerical error by which the arbitrators have expressed on the copy of the award delivered out, not

<sup>1</sup> Russell on Arb., 3d ed. p. 296; Knox v. Symmonds, 1 Ves. Jr. 369; Anderson v. Darcy, 18 id. 447; Delver v. Barnes, 1 Taunt. 48; Anon., 2 Chitt. 44; Payne v. Bailey, 7 Moore, 147; Ward v. Dean, 3 B. & Ad. 234; Potter v. Newman, 4 Dowl. 504; Rogers v. Dallimore, 6 Taunt. 111; Hardy v. Ringnose, 1 H. & W. 185; Hutchinson v. Shepperton, 13 Q. B. 955.

<sup>2</sup> Russell on Arb., 3d ed. p. 296; Fuller v. Fenwick, 3 C. B. 705; Hodgkinson v. Fernie, 27 L. J. C. P. 66; 3 C. B. N. s. 189.

<sup>3</sup> Russell, *ubi supra*; Mills v. Bowyer's Society, 3 Kay & J. 66.

the intention of their own minds, but one widely different. But the mistake and act of carelessness were so gross as to amount, though not morally, yet in a judicial sense of that term, to misconduct on the part of the arbitrators. "We think we do not extend the jurisdiction of the court beyond its proper limits, when we give relief in a case under these very peculiar circumstances, by holding this case to fall within the acknowledged power of the court to relieve against the misconduct of the arbitrators."<sup>1</sup>

Previously Baron Parke had said that an award could be set aside for an error in fact, only if it were "so glaringly wrong as almost to amount to misconduct in the arbitrators."<sup>2</sup>

The unwillingness of the court to set aside the award in the foregoing case upon the simple ground of mistake as such, and their feeling that it was necessary to drag it under the shelter of the doctrine of misconduct, indicated nevertheless a wide departure from the discretionary power so often asserted in earlier English cases. Yet long as was this stride, the judges of the Court of Exchequer were willing to go even further in the same direction. They were not satisfied with this notion of construing a mistake into misconduct. They thought that where the real fault in the award was a naked mistake, the award ought not to be set aside. The inflexible rule might sometimes work harshly; but, if a contrary doctrine were allowed to prevail, in the vast majority of arbitrations the losing party would assert that there had been a mistake. The arbitrator had made a mistake in omitting to take into account a large item, which the defendant acknowledged to be owing from him to the plaintiff. When the attention of the arbitrator was called to the error, he admitted that he had fallen into it, and wished the matter to be again referred to him, so that he might rectify his blunder; to this, however, the defendant objected. The court refused to set aside the award. They did not directly overrule

<sup>1</sup> *In re Hall & Hinds*, 2 Man. & Gr. 847 (1841).

<sup>2</sup> *Ashton v. Pointer*, 2 Dowl. 651 (1834).



the decision *in re* Hall & Hinds; but they said they would carry it no further, and distinguished this case from it on the slender point, that in Hall & Hinds the arbitrator had made an affidavit admitting his error, whereas in this case there was only an affidavit made by a party stating the fact of such an admission having been made by the arbitrator.<sup>1</sup>

But in the Court of Queen's Bench it has been said that the Exchequer judges had gone too far, and that the doctrine *in re* Hall & Hinds was sound. Accordingly an award was set aside where it appeared by the oath of the arbitrator that he had mistaken the intention of the parties, and had therefore omitted to include in his award a sum which was admitted to be due and owing to the plaintiff. Lord Denman, C. J., said that the rule of conclusiveness "is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless."<sup>2</sup>

"The old rule," that the "decision of an arbitrator, both upon the law and facts, was conclusive," though broken into by the Court of Queen's Bench in *Kent v. Elstob*,<sup>3</sup> and again by the Court of Common Pleas *in re* Hall & Hinds,<sup>4</sup> was reaffirmed and enforced in *Hodge v. Burgess*,<sup>5</sup> decided in the Court of Exchequer in May, 1858.

Baron Pollock said (1845) of *In re* Hall & Hinds, that the fact that the arbitrators had not done what they intended to do was the best ground on which to rest that decision, which it would be difficult otherwise to reconcile with previous cases. "The general rule is, that if an arbitrator makes a mistake which is not apparent on the face of his award, the party injured has no redress." The mistake alleged in this case

<sup>1</sup> *Phillips v. Evans*, 12 Mee. & W. 309; 13 L. J. Exch. 80; and see *Hagger v. Baker*, 14 id. 9; *Russell on Arb.*, 3d ed. p. 297.

<sup>2</sup> *Hutchinson v. Shepperton*, 13 Q. B. 955.

<sup>3</sup> 3 East, 18.

<sup>4</sup> 2 Man. & Gr. 847; 3 Scott, N. R. 250.

<sup>5</sup> 3 Hurl. & Nor. 293.

was the receipt of incompetent evidence, but the objection was not entertained by the court.<sup>1</sup>

**Mistakes of the Arbitrator on his own Principles.**— The judges in Connecticut say that it is acknowledged that a court of chancery can interfere and set aside an award where the arbitrators have fallen into "*mistakes on their own principles.*"<sup>2</sup>

**Objection that the Award is against Evidence.**— As the judgment and discretion of the arbitrators exercised upon a question of fact or merits is final, it follows that the award cannot be impeached on the ground that it is against the evidence.<sup>3</sup> Though of course, if it be so far against the evidence that the court will be obliged to infer from it fraud or corruption on the part of the arbitrator, a case for setting aside the award will be presented. But it will be upon the ground of misconduct, not of mistake.

**Clerical Errors, Blunders in Calculation, &c., in the Award.**— It will be remembered, that in his opinion *in re Hall & Hinds*,<sup>4</sup> Chief Justice Tindal said that he regarded the mistake as being substantially a clerical error. It was not precisely such, yet it was of that nature. A distinction certainly ought to be and might be drawn between this description of inaccuracy and a mistaken view of a question of fact or evidence, or an incorrect notion concerning a legal principle. Errors of the latter class are customarily called mistakes of the arbitrator, or mistakes in the award. Errors of the former class are certainly *mistakes*; but in order to distinguish them in language, as they certainly are distinguishable in their intrinsic nature, it would seem well to call them *blunders*: they are, precisely, blunders in writing out the decision; they are not mistakes in the deci-

<sup>1</sup> *Hagger v. Baker*, 14 Mee. & W. 9.

<sup>2</sup> *Brown v. Green*, 7 Conn. 536; *Allen v. Ranney*, 1 id. 569.

<sup>3</sup> *Brown v. Green*, 7 Conn. 536; *Bell v. Price*, 2 Zab. 578; *In re Bradshaw & The East and West India Docks, &c.*, 12 Q. B. 562.

<sup>4</sup> 2 Man. & Gr. 847, *ante*, p. 323.

sion itself. It is not the decision that is wrong, but the mere expression of the decision. The decision may be final, while the expression may be open to correction. To say that a court could not correct such "blunders," especially when acknowledged by the arbitrator, would, at least from the point of view of common sense, seem absurd. So needlessly rigid an application of the rule of conclusiveness would bring the rule itself into that degree of discredit, that it would soon be shaken, and, as a consequence, would probably be set aside, with very mischievous results, even in the case of mistakes in the decision, properly so called.

As a general rule, the courts in the United States, and sometimes, also, in England, will find some way of correcting clerical errors, blunders in calculation, and the like, as the following cases will show, or at least of vacating the award on account of them, so that the injustice will not be perpetrated.<sup>1</sup>

Where the arbitrator has written in his award a sum which is different from that which he intended to award and to write out, it is said that the award may sometimes be set aside, inasmuch as it is not, in fact, his award, since it is not the intentional decision of his mind.<sup>2</sup>

But the following case is hardly so liberal. An award was made in a cause under a general order of reference. Cross-motions were made to confirm and to set aside the award. Lord Loughborough said that he could not review the judgment of the arbitrators, or correct any error therein. And even supposing that it evidently appears from the accounts annexed, that the arbitrators, by mistake in calculation, have awarded a sum different from that which the figures really produce, yet that objection cannot be dealt with upon motion, if no corrup-

<sup>1</sup> See the discussion of *In re Hall & Hinds*, *ante*, p. 323; and see *post*, pp. 333, 335 in this chapter, under the head of "Recommitment," *Davies v. Pratt*, 16 C. B. 586; *Howett v. Clements*, 1 *id.* 128.

<sup>2</sup> *Brown v. Hellaby*, 26 L. J. N. S. Exch. 217; 1 Hurl. & Nor. 729; see *Whitmore v. Smith*, 31 L. J. Exch. 107; 7 Hurl. & Nor. 509.

tion is charged. Though, he added, "it would be another question, what the court would do as to enforcing an award by attachment in a case of evident mistake."<sup>1</sup>

Objection was taken to an award that it bore date the 23d August, 1813, and purported to be made by virtue of a bond of submission, which bore date "August 21, now last past," whereas, the bond declared on, and produced in evidence, bore date August 21, 1813, being August *instant*, instead of *past*. Further general releases were ordered from the beginning of the world until the "21st day of August last past, being the day of the date of the arbitration bond," thus apparently showing that the award was made under a bond of submission of August 21, 1812, whereas the bond declared on was dated August 21, 1813, and consequently no authority was shown to make the award. The court, in refusing to entertain these objections, said that, though the strict grammatical construction of the bond might be as contended, yet the intention of the arbitrators was perfectly clear. They had run into a mere inaccuracy of expression. "Last past" might be construed to refer to the *day*, and not to the *month*. And, at any rate, awards, often drawn up by illiterate men, were not to be tested by the strict rules of grammar.<sup>2</sup>

W. C. and F. S., appointed arbitrators, in pursuance of a power in the submission duly nominated an umpire. In making his umpirage, he erroneously described his authority as delegated to him by W. C. and Thos. S. The court held that the mistake did not vitiate the award, and would not justify them in setting it aside; on the ground that the recital was entirely unnecessary, and that in declaring on the award the recital need not be stated. It was further held that a correction of the error by a stranger was not fatal, but left the award in the state in which it was before the alteration, inas-

<sup>1</sup> Morgan v. Mather, 2 Ves. Jr. 15.

<sup>2</sup> Brown v. Hankerson, 3 Cow. 70; and see Higgins v. Kinneady, 20 Iowa, 474; Moulson v. Rees, 6 Binn. 32.

much as the change was made in an entirely immaterial part of the instrument.<sup>1</sup>

In a case where submission had been made by rule of court, Judge Story said, "If, however, there be an error of fact, as a mistake in calculation, apparent upon the face of an award, or if referees are satisfied that such a mistake has intervened and wish to correct the error, although the court will not set aside the award, yet it will recommit it to rectify the mistake."<sup>2</sup>

A court will interfere, otherwise than upon a bill in equity, to vacate an award on the ground of an alleged mistake in fact only if the mistake be such as the arbitrators would admit, as a miscalculation, and if it appear on the face of the instrument, or an accompanying paper, or be made out to the satisfaction of the arbitrators. In such case the award is not what the arbitrator intended it to be; it is not the result of his judgment. The "safe rule" is said to be that of Lord Thurlow, who always required the oath of the arbitrator himself to establish or admit the alleged mistake. The mistake must be such that no extrinsic evidence is necessary to establish it, and it must be really and not only colorably a mistake in computation; if it be a mistake in the principle upon which any part of the computation is based, it lies too deep to be reached by this principle. An award was accompanied by a paper entitled "general result," containing certain calculations, showing how the arbitrators had come to their final determination. It was alleged that these calculations showed that an item had been admitted and allowed which ought to have been rejected. But the court said this was no error in calculation, or mistake apparent on the face of the award, though the "general result" might be construed as a part of the award. It was an independent fact, which could be proved only by extrinsic evidence. It could not, therefore, be reached by proceedings in a court of

<sup>1</sup> *Trew v. Burton*, 1 Cr. & Mee. 533.

<sup>2</sup> *Kleine v. Catara*, 2 Gall. 61.

law, though the court did not feel "called upon to make any inquiry as to the power of courts of equity, upon bill filed, to set aside an award."<sup>1</sup>

**The Court cannot alter a Report or Award.** — The court has no power to *modify* an award, even to correct an obvious miscalculation, unless the authority be expressly given by statute.<sup>2</sup> Neither has the court power to vary the report of referees. Its authority is only to confirm, to reject, or to recommit. A judgment different from the award or report cannot be entered.<sup>3</sup> No inquiry can be made into an alleged mistake, for the purpose of ascertaining its amount, rectifying it, and entering judgment for a correct amount.<sup>4</sup> Yet in one instance, where the submission reserved to the court the right to review the law, it was held that the referee's law was erroneous, and had led him to an opinion precisely opposite to that which he should have adopted. A judgment substantially different from, and in fact even contrary to, the report was therefore entered.<sup>5</sup> But the circumstances in this cause made it practically resemble the case of an alternative award, and the court probably felt justified in treating it as such. They doubtless considered that the phraseology of the submission contained the element if not the literal expression of alternativeness.

**Variance in Duplicate Awards.** — Where arbitrators delivered to one of the parties a paper purporting to be their award, but which differed materially from a paper also delivered to the other party as their award, the difference being as to courses and distances in the description of certain land in dispute, a variance of so substantial a nature was held to be fatal. Both instruments were declared void, since it was impossible to say what was in fact the award.<sup>6</sup> But the variance must be

<sup>1</sup> Bell v. Price, 2 Zab. 578.

<sup>2</sup> Smith v. Cutler, 10 Wend. 589.

<sup>3</sup> Commonwealth v. Pejepscut Proprietors, 7 Mass. 399.

<sup>4</sup> Commonwealth v. Pejepscut Proprietors, 7 Mass. 399; Phelps v. Goodman, 14 Mass. 252.

<sup>5</sup> Commonwealth v. City of Roxbury, 9 Gray, 451.

<sup>6</sup> Green v. Lundy, Cox, 435; and see this case, *ante*, in the chapter on "The

substantial ; if it be immaterial or clerical in its nature, like the omission of a word clearly to be supplied from the context, it will not vitiate the award. For example, where there was an accidental omission, obviously to be supplied, of the word "dollars" in a counterpart copy of the award given to one of the parties, the award was enforced as if the word had not been wanting.<sup>1</sup>

An award was written by the arbitrators on the back of the bond of submission. In describing the parties and arbitrators, reference was made to them as being named "in the within bond." Another instrument, intended to be a duplicate award, was prepared for the other party, in which the arbitrators and parties were described at length. The court disregarded this "slight variation in phraseology." A variance which will avoid the award, it was said, must be substantial, relating to a material matter and affecting the sense of the award.<sup>2</sup>

**Method of Availing of an Alleged Mistake.**—As might be anticipated, where the courts are in such confusion as to the effect of a mistake, a still greater confusion exists as to the mode of proceeding in order to avail of the defect. In a large proportion of the cases cited in this chapter, the fact has been set up and alleged in the courts of law as a defence or upon motion. And it is probable that it might generally be thus availed of, if apparent on the face of the award itself. In surprisingly few cases has the method of procedure been a subject of discussion, and these few, it is feared, will not be found to be very satisfactory.

Many cases bring corruption, partiality, misbehavior, and mistake on the part of the arbitrators into the same category. The rule is said to be established, if the submission be *in pais*, that none of these defects can be availed of in defence in a suit at law, but that the only remedy is by a bill in equity seeking Duration of the Arbitrator's Authority," p. 227 ; *Spofford v. Spofford*, 10 N. H. 254.

<sup>1</sup> *Platt v. Smith*, 14 Johns. 368.

<sup>2</sup> *Spofford v. Spofford*, 10 N. H. 254.

to correct or vacate the award. But if the submission be in a pending cause, it is said, application may be made to the court to set aside the award.<sup>1</sup>

But in Massachusetts, before the Supreme Court had such full equity powers as have been since conferred upon it, and when it was therefore incapable of correcting or vacating an award upon a bill brought for that purpose, the judges, in order to prevent a failure of justice, allowed corruption, excess of authority, or gross mistake, to be pleaded in an action on the award.<sup>2</sup>

The rule in New York is that a court of chancery may correct a palpable mistake or miscalculation made by the arbitrators; but there is no such remedy at law, unless it be given by a statute governing the case.<sup>3</sup>

In New Hampshire it is admitted that a judgment on the merits is conclusive. But, it is said, "where the mistake is one simply of a fact not involving the exercise of such a judgment as a tribunal must exercise upon the merits of a question where conflicting claims are to be examined and the credibility of witnesses to be weighed, but is one of mere arithmetical computation, there seems to be no reason why the matter may not be inquired into in a suit at law."<sup>4</sup>

A pending cause had been submitted to arbitrators without any rule or order of court. A motion was made to set aside the award on the ground of a mistake in law. The court said there was no authority whatsoever enabling them to interfere for this cause upon motion. The relief lay only in equity. Though had there been a special rule of reference, and an award so notoriously against justice and the arbitrator's

<sup>1</sup> *Bean v. Farnam*, 6 Pick. 269; *Elkins v. Page*, 45 N. H. 310; *Fletcher v. Hubbard*, 43 id. 58; *Sisk v. Garey*, 27 Md. 401; *Bassett v. Harkness*, 9 N. H. 164; *Strong v. Strong*, 9 Cush. 560 (p. 568); *In re Williams*, 4 Denio, 194.

<sup>2</sup> *Bean v. Farnam*, 6 Pick. 269; *Strong v. Strong*, 9 Cush. 560.

<sup>3</sup> *Newland v. Douglass*, 2 Johns. 62; *Ferson v. Drew*, 19 Wis. 225; and see *Barlow v. Todd*, 3 Johns. 367; *De Long v. Stanton*, 9 id. 38.

<sup>4</sup> 26 N. H. 206; and see *Carey v. Wilcox*, 6 id. 177.



duty as to constitute misconduct on his part, then the case of *Chace v. Westmore*<sup>1</sup> might, by inference, be construed as an authority in support of the propriety of this mode of proceeding.<sup>2</sup>

**Recommitment for Correction of Acknowledged Errors.** — If the award or report be returnable into court, the proper way to deal with such errors would seem to be by a recommitment for the specific purpose of the correction.<sup>3</sup> In England the matter of referring back has been provided for by statute.<sup>4</sup>

Before the passage of this statute, it was said that where the court perceived in the report some great mistake, or even some "very small mistake, perhaps a mistake in the Christian name of the plaintiff, or some error in the heading of the cause, or something of that description," the judges could not correct the mistake or send his report back to the arbitrator to be corrected by him. Nothing could be done save to set it aside altogether.<sup>5</sup>

Where the arbitrator had by mistake called the defendant "David" instead of "Daniel," the award was sent back to the arbitrator, in order that this "mere slip" might be amended. The court said it had no other power in the matter.<sup>6</sup>

**Recommitment for Re-hearing.** — But the cases in which recommitment is proper are by no means limited to the rectification of blunders like the foregoing. Recommitment is often ordered for obtaining substantial alterations and amendments as the result of a fresh hearing and consideration.<sup>7</sup>

<sup>1</sup> 13 East, 357.

<sup>2</sup> *Cranston v. Executors of Kenny*, 9 Johns. 212.

<sup>3</sup> *Kleine v. Catara*, 2 Gall. 61; *Blood v. Robinson*, 1 Cush. 389; *Mills v. Master, &c., of the Society of Bowyers*, 3 Kay & J. 66; *Davies v. Pratt*, 16 C. B. 586.

<sup>4</sup> 17 & 18 Vict. c. 125, § 8.

<sup>5</sup> *Mills v. The Master, &c., of the Society of Bowyers*, 3 Kay & J. 66.

<sup>6</sup> *Davies v. Pratt*, 16 C. B. 586; *Howett v. Clements*, 1 id. 128; and see *Trew v. Burton*, 1 Cr. & Mee. 533, stated *ante*, pp. 328, 329.

<sup>7</sup> *Cumberland v. North Yarmouth*, 4 Greenl. 459; *M'Rae v. M'Lean*, 2 El. & Bl. 946; and cases cited *post* in the further discussion of this topic.

**Recommitment for Errors in Form.** — As a general rule, it is said to be perfectly proper to recommit the report for the performance of a mere ministerial act, requiring no hearing of parties or deliberation ; as, for example, in this case, to enable the majority of the referees, who had signed the report, to add to it the omitted but undisputed fact that the non-signing minority had been present at the hearings. The substance of the award is not to be changed ; the mere certification of past facts is desired. Therefore, it was immaterial that the report went back into the hands of the two referees who originally signed it, and who now, without notice to the third, and without his knowledge, made the desired correction and affidavit and returned the report.<sup>1</sup>

In an action of *indebitatus assumpsit* the pleas were, first, except as to £150, *non assumpsit* ; secondly, as to that sum, payment. The arbitrator not having determined the issue on the account stated, the award was sent back to him by the court, to be corrected in this particular.<sup>2</sup>

**Recommitment for Costs.** — An award may be recommitted for the purpose of having the amount of costs ascertained and stated in it.<sup>3</sup>

**Power and Duty of the Arbitrator after Recommitment.** — By a simple recommitment, not specifying a particular purpose, an arbitrator is not restricted within narrower limits than were prescribed by the original submission.<sup>4</sup>

A cause was ordered to be sent back to an arbitrator that he might decide on certain matters which were specified in the order. He made an amended award, deciding these matters, and ordering the defendant to bear the costs of the amended award. It was held that he had power to give this direction concerning costs ; for whatever power he had “ under the

<sup>1</sup> Brann v. Inhabitants of Vassalboro', 50 Maine, 64.

<sup>2</sup> Bird v. Penrice, 6 Mee. & W. 754.

<sup>3</sup> *In re* Huntley, 1 El. & Bl. 787.

<sup>4</sup> French v. Richardson, 5 Cush. 450 ; M'Rae v. M'Lean, 2 El. & Bl. 946.

original submission, he had impliedly under the reference made back to him.”<sup>1</sup>

If the recommitment be for the correction of an acknowledged or obvious error, so that there is no necessity for a re-hearing, the arbitrator may make the amendment and return the corrected award without notifying the parties or giving them any opportunity to be heard;<sup>2</sup> and this, though he makes a new award instead of “botching up” the old one.<sup>3</sup> Recommitment under such circumstances, at least if it be made with consent of the parties, may be regarded as an agreement that the error may be corrected.<sup>4</sup>

If a report be recommitted on motion of a party who thinks himself aggrieved by it, no absolute obligation is upon the referees to alter it, or even to hear the parties again. They may, if they see fit, simply return again an identical report.<sup>5</sup>

**Recommitment is for the Discretion of the Court.** — The question whether or not an award or report which has been returned into court shall be recommitted is one of discretion, and not of law. If the court to which a report is returnable refuses to recommit it, this decision is not subject to the revision of a court of law upon exception.<sup>6</sup> *Seem*, also, that the question of acceptance or non-acceptance of a report, objected to on the strength of extraneous facts alleged concerning the proceedings before the referees, not being fraud, partiality, or corruption, is of the same nature.<sup>7</sup>

**Recommitment must be of Whole Case.** — Recommitment, if not made simply for the correction of a clerical error, or of

<sup>1</sup> *M’Rae v. M’Lean*, 2 El. & Bl. 946.

<sup>2</sup> *Blood v. Robinson*, 1 Cush. 389; *Howett v. Clements*, 1 C. B. 128; *Bird v. Penrice*, 6 Mee. & W. 754; *In re Huntley*, 1 El. & Bl. 787; *Johnson v. Latham*, 20 L. J. Q. B. 236; *In re Morris v. Morris*, 6 El. & Bl. 383.

<sup>3</sup> *Per* Lord Campbell, *In re Huntley*, 1 El. & Bl. 787.

<sup>4</sup> *McGheehen v. Duffield*, 5 Penn. St. (Barr) 497.

<sup>5</sup> *May v. Haven*, 9 Mass. 325.

<sup>6</sup> *Walker v. Sanborn*, 8 Greenl. 288; *Cumberland v. Inhabitants of North Yarmouth*, 4 id. 459.

<sup>7</sup> *Walker v. Sanborn*, 8 Greenl. 288.

one which may be corrected from an inspection of the report itself, must be of the whole case, and not of a single issue only.<sup>1</sup>

**Impeaching the Award by Extrinsic Evidence or by the Arbitrator's Testimony of a Mistake.** — If an error or mistake is apparent on the face of the award, no further evidence will be required to establish it. But if it is not thus fully apparent, it may be desirable to adduce extrinsic evidence. It is very seldom, however, that the courts have allowed awards to be impeached by extrinsic evidence for errors not evident upon the instrument alone, or with its accompanying documents.<sup>2</sup> Judge Story makes it a *quære* in *Kleine v. Catara*,<sup>3</sup> whether collateral evidence, to show an error in law not appearing on the face of the award, is admissible. In *Boston Water Power Company v. Gray*,<sup>4</sup> at the trial at *Nisi Prius*, it was ruled that in showing gross errors and palpable mistakes, of a nature to avoid the award, the impeaching party was not confined to errors and mistakes apparent on the award; but that evidence might be given of such gross and palpable error, though not apparent on the face of the award; and that it might be shown that the arbitrators, "through inadvertence or mistake, assumed a fact as true which was not true, or overlooked some material fact which was true, in either case affecting their decision." Judge Shaw said that since this part of the ruling of the lower court had not been excepted to, it had not been brought under the consideration of the whole court, and was "not, therefore, affirmed by the decision in this case."

Many cases also show that the affidavit or testimony of an arbitrator may be received to show that a mistake has been made in the award. But the kind of mistake which can be

<sup>1</sup> *Smith v. Warner*, 14 Mich. 152; but see *M'Rae v. M'Lean*, 2 El. & Bl. 946.

<sup>2</sup> *Pleasants v. Ross*, 1 Wash. 156; *Hartshorne v. Cuttrell*, 1 Green's Chy. 297; *Brickhouse v. Hunter*, 4 Hen. & Munf. 363; *Goldsmith's Administrator v. Tilly*, 1 Harris & J. 361.

<sup>3</sup> 2 Gall. 61.

<sup>4</sup> 6 Metc. (Mass.) 131.

shown in this way is limited to cases<sup>1</sup> where the error has occurred in making up or expressing the opinion or judgment. The fact of a miscalculation, or of an accidental and unintentional omission, might be thus made out. But no case furnishes any authority for supposing that a substantial error in judgment could be thus proved. No arbitrator could be allowed to testify that he thought he had made a mistaken decision, or that he had misunderstood or misapplied the rules of law. Testimony of the arbitrators to impeach their own award is inadmissible.<sup>2</sup>

In a Massachusetts case an arbitrator was summoned as a witness to prove a mistake. The mistake, as it turned out, was not properly a mistake in the award, but a mistake in his understanding of the opinion of his co-arbitrators, and in the contents of the award. It seemed that he thought that it had been agreed to charge rent at \$60 for five years, whereas the others intended and understood that rent was to be charged at \$75 for ten years. The latter was the tenor of the award, which this arbitrator signed without reading it, on the supposition that it embodied a judgment which he knew and in which he concurred. The court refused to admit the proffered testimony. It was "only another mode of asking whether the award, as drawn up and signed, was conformable to the principles agreed to by the arbitrators, or, in other words, whether the award as it now appears is not different, in regard to certain debts and credits, from that which was previously agreed upon by the arbitrators at their conference. It appears to us that this would be inadmissible on many grounds. . . . The most the witness could say was, that according to his present recollection he understood the agreement of the arbitrators at their conference to be, to charge a certain rent for five years, when by his

<sup>1</sup> *Hartshorne v. Cuttrel*, 1 Green's Chy. 297; *In re Hall & Hinds*, 2 Man. & Gr. 847; and see *ante*, p. 323, the cases cited in note 1.

<sup>2</sup> *Bigelow v. Maynard*, 4 Cush. 317; and see, in the chapter on "The Duration of the Arbitrator's Authority," the paragraphs entitled Exhaustion of Authority by making an Award or Report.

formal and solemn act, done at the time, in concurrence with the other arbitrators, in a form binding upon the rights of the parties, he has declared that they agreed to allow rent for ten years. He could not be received thus, by his parol testimony, to contradict his formal award in writing.”<sup>1</sup>

Speaking of summoning a referee to testify as to the evidence on which he had made up his report, for the purpose of enabling the court to judge of the correctness of his inferences of fact and conclusions of law, Shaw, C. J., said that such a proceeding would not be allowed. “Formerly, it is believed, it was not unfrequent to call upon referees thus to testify, with a view to prevent the acceptance of their report; but we think it contrary to the principle on which such references proceed, and opposed by the most recent and satisfactory decisions.”<sup>2</sup>

**Effect of setting aside a Report.** — If the report of a referee be entirely set aside, the cause remains as if it had never been sent to a referee at all.<sup>3</sup>

Where referees have once made their report, which has been set aside, it is incompetent for the court again to refer the case to the same parties without again obtaining the assent of the parties to the action to such reference, precisely as in the original reference.<sup>4</sup>

Where the order of reference is made by stipulation of parties to a referee named, there is no power in the court to appoint a new one without obtaining the assent of the parties to such appointment.<sup>5</sup>

**Promise to correct Error.** — A promise by a party to a submission to correct any mistakes which the arbitrators may have made is without consideration and void.<sup>6</sup>

<sup>1</sup> *Withington v. Warren*, 10 Metc. (Mass.) 431 (*per Shaw, C. J.*); and see *Campbell v. Western*, 3 Paige, 124.

<sup>2</sup> *Ward v. American Bank*, 7 Metc. (Mass.) 486.

<sup>3</sup> *Rice v. Benedict*, 18 Mich. 75.

<sup>4</sup> *Smith v. Smith*, 28 Ill. 56.

<sup>5</sup> *Smith v. Warner*, 14 Mich. 152.

<sup>6</sup> *Efner v. Shaw*, 2 Wend. 567.

## CHAPTER XI.

### THE AWARD MUST BE CO-EXTENSIVE WITH THE SUBMISSION.

The stipulation called the *ita quod* clause in the submission.

The *ita quod* clause, if used, still retains its old force.

The modern rule supersedes, in a measure, the *ita quod* clause.

The intention of the parties is the test.

Withdrawal of some matters from the arbitration.

The nature of the matters submitted may make the determination of all indispensable.

Effect of a failure to determine all the matters submitted.

Exception expressed in the award.

The motive of the arbitrators is immaterial.

An award not co-extensive with the submission is not final.

Awards that nothing is due at the date of submission.

Award of a sum of money under a general submission.

Separate matters need not be specifically mentioned.

Awarding separately on distinct matters.

Awards of a gross sum under a submission of several matters.

Award of a particular thing under a general submission.

Awarding on different pleas in an action.

An award may be co-extensive with the submission by implication.

Awards seeking to do general equity are often not final.

The award must decide respecting all the parties.

The arbitrator need not award on incidental matters.

Award of a balance upon money claims.

The award need determine only such matters as are brought to the arbitrator's notice.

Notice by the recitals of the submission.

The recitals of the award may prove notice.

Silence of the award on an undecided matter.

A party not injured by the effect cannot avoid the award.

Method of availing of the objection that the award is not co-extensive with the submission.

Rules of evidence.

Presumption that the award disposes of all matters presented.

This presumption is not conclusive.

Burden of proof.

Adjudications exemplifying the rule of favorable presumption.

Favorable presumption in cases of doubt.

A case where the favorable presumption was not admitted.

Award in fact but not apparently co-extensive with the submission.

Presumption that the award does not include matters not submitted.

Presumption based on award of mutual releases.

Award in the alternative.

**The Stipulation called the *ita quod* Clause in the Submission.—**

The old rule, both at law and equity, was, that where more than one matter was submitted, the award might determine one matter only, and be good *pro tanto*, provided that no actual injustice between the parties was effected by this elimination.<sup>1</sup> If it was intended to oblige the arbitrators to pass upon all the matters, and, in the event of their failing to do so, to regard their award as invalid; the obligation was imposed upon them by introducing into the submission or bond the clause "*ita quod arbitrium fiat de (et supra) præmissis*" (provided the award be made upon and concerning the premises).<sup>2</sup> If the submission be made expressly conditional by this or an equivalent phrase, a neglect to pass upon any matter included in the submission, and brought to the notice of the arbitrators, will inevitably avoid the award.<sup>3</sup>

If the submission ran, "so as the said award," or "so as the same award," be made within a time named, though the *ita quod* clause was not added, yet its force was held to be sufficiently contained in these words, and a determination of all the matters contained in the submission was indispensable to the validity of the award.<sup>4</sup>

In *Carnochan v. Christie*,<sup>5</sup> the submission entered into in a pending cause was, "We agree to the reference. The arbitrators to determine all matters in controversy as exhibited in the

<sup>1</sup> Russell on Arb., 3d ed. p. 248; citing *Wrightson v. Bywater*, 3 Mee. & W. 199; *Dowse v. Cox*, 3 Bing. 20; *Ormelade v. Coke*, Cro. Jac. 354; *Hide v. Cooth*, 2 Vern. 109; *Baspole's Ca.*, 8 Rep. 97 b; *Payne v. Cook*, cited in *Simmonds v. Swaine*, 1 Taunt. 548; *Bean v. Newbury*, 1 Lev. 139; *Randall v. Randall*, 7 East, 81.

<sup>2</sup> *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482.

<sup>3</sup> *Richards v. Drinker*, 1 Halst. 307; *Harker v. Hough*, 2 id. 428.

<sup>4</sup> Russell on Arb., 3d ed. p. 249; *Cockson v. Ogle*, 1 Lutw. 550; *Risden v. Ingleit*, Cro. Eliz. 838; *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482; *Wright v. Wright*, 5 Cow. 197.

<sup>5</sup> 11 Wheat. 446.



pleadings," &c. The court did not say in express terms that the decision of all the matters submitted was essential to the validity of the award; but they clearly assumed and acted upon this doctrine by categorically showing that each one of those several matters which the defendant asserted had not been decided, had in fact been sufficiently determined and disposed of.

**The ita quod Clause, if used, still retains its Old Force.**— It is probable that at the present day this precise and formal phrase of "ita quod," &c., is seldom inserted in submissions. Yet if it be found there, it retains all its old force.

In *Ott v. Schroepfel*,<sup>1</sup> Paige, J., says: "If the submission is made conditional by the clause of 'ita quod arbitrium fiat de præmissis,' and recites several distinct matters which are specifically referred, and the arbitrators omit to decide one of the matters, and there are no general words in the award which can be construed to embrace a decision on such particular matter, the whole award is bad."

**The Modern Rule supersedes in a Measure the ita quod Clause.**— It is certainly always wise to take the precaution, if not of inserting this precise phrase, yet at least of expressing in some shape the stipulation for a decision upon all the matters submitted, if the parties wish to make the validity of the award conditional and dependent, beyond the possibility of question, upon such a comprehensive determination. Yet this can no longer be regarded as so indispensable a formality as it was in times past. The doctrine now generally established is that whatever the parties submit they intend to have decided; for it cannot be presumed that they would be content to submit some only of the disputes presented, without also disposing of the others. Generally, therefore, it is said that the arbitrators must make their award concerning all the points submitted and raised before them.<sup>2</sup>

<sup>1</sup> 5 N. Y. (1 Seld.) 482. So also *Wright v. Wright*, 5 Cow. 197.

<sup>2</sup> *James v. Thurston*, 1 Cliff. C. C. 367; *Edwards v. Stevens*, 1 Allen, 815;

Baron Parke said, in 1838, that "the old rule was that unless the submission expressly made it conditional with an *ita quod*, an award of part only was good. . . . In more modern cases it has been said that an express condition is not required."<sup>1</sup> For example, C. J. Willes said, "Were it not for the cases, I should be of opinion that when all matters are submitted, though without such condition, all matters must be determined; because it was plainly not the intent of the parties that some matters only should be determined, and that they should be left at liberty to go to law for the rest."<sup>2</sup>

**The Intention of the Parties is the Test.**—The question is properly of the intention of the parties. The courts will look at the language of the submission in its every part, and from a consideration of the whole will determine the matter of intent. If the reasonable construction appears to be that the parties intended to have every thing decided if any thing should be, then a decision of all the matters submitted will be imperatively required.<sup>3</sup> And, as has been just stated, the presumption is in favor of this purpose on the part of the disputants.

But if any thing in the submission indicates a contrary purpose, an award determining a part only of the matters submitted will be sustained. Thus a clause empowering the arbitrator to make one or more awards, at his discretion, if not overcome by other portions of the award, is regarded as conferring upon him authority to award concerning a single matter only out of several; and this, too, although the submission contains the proviso "so as such award or awards be made before" a certain day, or so as the award be "concerning the premises." In *Wrightson v. Bywater*, Baron Parke said that the parties had

*Varney v. Brewster*, 14 N. H. 49; *Russell on Arb.*, 3d ed. p. 248; citing *Simmonds v. Swaine*, 1 Taunt. 554; *Hide v. Petit*, 1 Ca. in Chy. 185.

<sup>1</sup> *Wrightson v. Bywater*, 3 Mee. & W. 199.

<sup>2</sup> *Bradford v. Beavan*, Willes, 270.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 249; *Wrightson v. Bywater*, 3 Mee. & W. 199; *Bradford v. Bryan*, Willes, 268; *Birks v. Trippett*, 1 Saund. 32; *Bowes v. Fernie*, 4 M. & Cr. 150.

given the arbitrator the *power* to dispose of all matters, but had not made it a *condition* that all matters should be disposed of by him. The only case which it was regarded as "necessary to consider as opposed to this view of the question," was stated to be that of *Biddell v. Dowse*,<sup>1</sup> where a similar clause was embodied in the agreement of reference. But since in that cause this point was not raised or considered, the judgment cannot be treated as "a binding authority upon a point which was never brought before the court."<sup>2</sup> In discussing the general principle, the same judge remarked: "The question, therefore, is reduced to this, whether, under this reference, it is necessary to the validity of any award to be made pursuant to it, that it should decide all the matters in dispute. And this is a mere question of construction, for there is no rule of law requiring it; its necessity arises from the contract of the parties."

**Withdrawal of some Matters from the Arbitration.**—The parties may, however, at any time after the submission has been entered into, and before the award has been made, withdraw from the consideration of the arbitrators any portion of the matters submitted. If they do so, it will, of course, be needless and even erroneous for the arbitrators to include these matters in their decision. The withdrawal operates as a revocation, *pro tanto*, of the submission, or as a waiver by the party, who was the demandant in the part withdrawn, of his right under the submission to insist upon having his claim presented and adjudicated by the arbitrators.<sup>3</sup>

A demand is not withdrawn from the consideration of the arbitrator simply because it is not denied or disputed by the party against whom it is made. If presented before the arbitrator, it must be considered by him in making up the award, though it be admitted by the defendant to be correct. The

<sup>1</sup> 6 Barn. & Cr. 255; 9 Dowl. & Ry. 404.

<sup>2</sup> Russell on Arb., 3d ed. p. 249; *Wrightson v. Bywater*, 3 Mee. & W. 199; *Dowse v. Coxe*, 3 Bing. 20.

<sup>3</sup> *Varney v. Brewster*, 14 N. H. 49; *Bird v. Cooper*, 4 Dowl. 148; and see Chapter VII., "Duration of the Arbitrator's Authority."

admission only supersedes the necessity of proof. The omission of the matter would avoid the award.<sup>1</sup>

**The Nature of the Matters submitted may make the Determination of all indispensable.**— It may be, even where the *ita quod* clause, or any equivalent, has not been introduced, and the language of the submission could not in itself be construed to require imperatively a determination of all the matters submitted, that the nature of these very matters themselves will create the necessity. This will be the case where there is such a connection and interdependence between the various matters covered by the submission that the decision and disposition of some of them only, to the exclusion of others, would operate to produce injustice between the parties.<sup>2</sup>

The cited case was as follows: A. mortgaged his real estate to B., to secure a debt. He then conveyed his real and personal estate to C., the wife of D., and took from C. and D. their bond to support him for the rest of his life, secured by mortgage on the real estate. A controversy arose, and the parties, in order to adjust it and to dissolve the contract, submitted the whole matter. The award was that A. should release a certain portion of the real estate to C., and that C. should release the remainder to A. The bond for maintenance was not mentioned, nor the debt or mortgage to B., nor the claim of A. for non-performance of the contract to support him, nor the claims of C. and D. for improvements. Nor did any thing indicate that the releases were intended to be in satisfaction of these respective claims, though there was nothing in the submission requiring all the matters embraced by it to be determined. But the court said that the matters omitted were so connected with the title to the real estate that it was very apparent that injustice would be done by permitting them to remain unadjusted and sustaining the award. The award was accordingly declared void.

<sup>1</sup> Russell on Arb., 3d ed. 256; *In re Robson & Railston*, 1 Barn. & Ad. 723.

<sup>2</sup> McNear v. Bailey, 18 Maine, 251; *Archer v. Williamson*, 2 Har. & Gill, 62.

**Effect of a Failure to determine all Matters submitted.**—If the submission requires an award to be concerning all the matters submitted, either by virtue of the construction placed by the court upon the submission as a whole, or by reason of the introduction of the *ita quod* clause, or equivalent phraseology, a failure to determine any controversy submitted will render the whole award void.<sup>1</sup>

**Exception expressed in the Award.**—If the arbitrator in his award expressly excepts out of his decision a particular matter included in the submission, and declares that he does not decide it, and that he leaves it to one of the parties to be prosecuted by him if he should see fit, it is obvious that the award will be altogether bad. For being obliged to pass upon every thing, it is nevertheless apparent on the face of the award that he has not done so.<sup>2</sup>

If the submission be general, the exception of any matter in the award will suffice to avoid it.<sup>3</sup> For under a general submission every thing in dispute between the parties is included, and the exception of any thing makes the award incomplete.

In *Bowes v. Fernie*,<sup>4</sup> the arbitrators stated, for a reason assigned, that they had “altogether abstained from taking the Durham account into consideration, and from arbitrating in any way thereupon.” The duty of the arbitrators appeared to be to correct this account, if they thought it wrong in any respect. The Vice-Chancellor was of opinion that the award might be upheld by construing this language as equivalent to stating that the arbitrators had considered the subject and had decided not to alter the account. But Lord Chancellor Cotten-

<sup>1</sup> *Ott v. Schroepel*, 1 Seld. 482; *Wright v. Wright*, 5 Cow. 197; *McNear v. Bailey*, 18 Maine, 251; *Richards v. Drinker*, 1 Halst. 307; *Harker v. Hough*, 2 id. 428; *Carnochan v. Christie*, 11 Wheat. 446; *Edwards v. Stevens*, 1 Allen, 315; *Varney v. Brewster*, 14 N. H. 49; *Stone v. Phillips*, 4 Bing. N. C. 37; *Mitchell v. Staveley*, 16 East, 58.

<sup>2</sup> *Bradford v. Bryan*, Willes, 268; *Wright v. Wright*, 5 Cow. 197.

<sup>3</sup> *Ott v. Schroepel*, 5 N. Y. (1 Seld.) 482; *Turner v. Turner*, 3 Russell, 494.

<sup>4</sup> 4 M. & Cr. 150.

ham refused to entertain this construction, and set the award aside on motion.

**The Motive of the Arbitrators is immaterial.**—The motive from which the arbitrators resolve to omit the determination of a matter submitted, seems to be immaterial. The question is what their duty or obligation in the premises was, not what they thought that it was. Thus, if they decline to pass upon any specific point, and give as their reason for declining that they deem it to be beyond their authority to do so; nevertheless if they are in error in this respect, and the point is not really beyond the scope of their powers, then their award will be bad. For example, having stated in their award that they had not passed upon a certain claim to an annuity because they conceived that they were prevented from doing so by reason of the pendency of a suit in chancery concerning it, the court held that they were not precluded by the suit from considering it, and that their misconception was no excuse for the omission; wherefore the award was held void.<sup>1</sup>

A somewhat similar ruling has been made in another cause. An arbitrator to whom a cause had been referred recited in his award the fact of the presentment of certain claims by the plaintiff, but said that these were not matters in difference in the cause, and that therefore he had not taken them into account. The court said that they would not regard his statement in this particular as conclusive, but would look into the question of whether or not these omitted matters were in fact in issue in the cause, and, upon finding that they were so, would set aside the award for want of finality.<sup>2</sup>

**An Award not co-extensive with the Submission is not final.**—The rules that an award must be co-extensive with the submission, and that it must be final, necessarily coalesce in many instances. Finality means, briefly, that the controversies sub-

<sup>1</sup> *Bowes v. Fernie*, 4 M. & Cr. 150; and see *Brown v. Meverell*, Dyer, 216 a; *Wilkinson v. Page*, 1 Hare, 276.

<sup>2</sup> *Samuel v. Cooper*, 2 Ad. & El. 752; and see *Brophy v. Holmes*, 2 Molloy, 1.

mitted must be so thoroughly and completely decided as not to continue possible subjects of litigation in the future. It is obvious that if the award leaves a portion of the dispute undecided, it does not finally shut the door against future misunderstanding as to the very matter submitted. The rules and cases arising under this duplex principle seem to be more appropriately discussed here than under the head of "Finality." They are as follows:—

It was in controversy whether or not A. had been in partnership with B., and, if so, whether or not the partnership had been concluded, and when it had been concluded. The award was only that if a partnership had ever existed it had been put an end to upon a day named. The award was held bad, because it did not cover the ground of the submission, and was not a final decision of the matters submitted.<sup>1</sup>

**Awards that a Matter remain in Statu Quo.**—Among several matters in dispute between the parties, there was one as to whether or not one of them was entitled to indemnity for his liability to pay a note made by himself, and indorsed by the other. The award ordered this matter to stand as it was. Held, the award was void.<sup>2</sup>

But some other cases are to be distinguished from this last upon principle. If the matter which the award orders to stand, as it is, is sufficiently certain in this *status*, the award may be good. Thus, an award that one party should release to the other all actions and debts, except certain bonds, was held good. For it was not an exception of these bonds from the award, leaving them an outstanding and undecided matter in dispute; but rather it was a finding in favor of their validity, and that they should remain in full force.<sup>3</sup> They were in their own nature certain and definite, and an order that they should remain in force was considered sufficiently final.

<sup>1</sup> *Bhear v. Harradine*, 7 Exch. 269.

<sup>2</sup> *Wilkinson v. Page*, 1 Hare, Ca. in Chy. 276.

<sup>3</sup> *Sallows v. Girling*, Cro. Jac. 277; *Berry v. Penring*, ib. 399; *Russell on Arb.*, 3d ed. p. 252; and see *Strong v. Strong*, 9 Cush. 560.

**Awards that Nothing is due at the Date of Submission.**—An arbitrator, unless otherwise expressly authorized by the submission, can determine only matters in difference matured or existing at its date. Consequently his award that there is nothing due at the time, though he expressly says that he does not find that something may not come due at some subsequent day, under an agreement already entered into, and which he ought to consider, so far as it could give rise to or have any bearing upon claims already accrued, is good.<sup>1</sup>

To the same effect is the following cause: The plaintiff presented a demand for a loss which he alleged that he had sustained upon some hats. The arbitrator, in his award, recited that the plaintiff had failed to prove that at the date of the order of reference he had sustained such a loss, and therefore found that he was not entitled to recover any thing upon that claim. The court held the decision to be sufficiently final, as being virtually a finding that at the time of the reference nothing was due on account of this claim.<sup>2</sup>

**Award of a Sum of Money under General Submission.**—If a submission be general, an award of a sum of money as due from one party to the other will be presumed to be a full execution of the submission. In like manner, if the submission be of specific matters, and conclude with a general submission of all other claims, an award disposing in terms of the specific matters, and then directing a certain sum to be paid by one party to the other, will be presumed to be good as an execution of all the duties imposed upon the arbitrators.<sup>3</sup>

**Separate Matters need not be specifically mentioned.**—Where several specific matters are submitted, if the award appear upon its face to be intended to decide them all finally, and is in fact logically capable of doing so, it need not mention or dispose of them individually. A general finding will suffice,

<sup>1</sup> *Harding v. Forshaw*, 1 Mee. & W. 415.

<sup>2</sup> *Cockburn v. Newton*, 2 Man. & Gr. 899.

<sup>3</sup> *Strong v. Strong*, 9 Cush. 560; *Shirley v. Shattuck*, 4 id. 470; *Bigelow v. Maynard*, ib. 317.



provided there be no demand among them of such a nature that it cannot be thus disposed of.<sup>1</sup> For example, if all the demands consist of disputes concerning indebtedness, a general award of a certain sum, to be paid by the one party to the other, will be good.<sup>2</sup> But if among demands of this nature were also included a dispute concerning a boundary line, the award of a sum of money would be bad, since in the nature of things it could not conclude the boundary controversy.<sup>3</sup>

**Awarding separately on Distinct Matters.**— If, however, there be any thing in the submission indicative of an intention of the parties to have separate matters separately passed upon, it will be necessary for the arbitrators to respect this purpose.<sup>4</sup> Thus in the cited case the submission was of “said action at law and all other matters in difference between the parties,” and the phraseology of the agreement was disjunctive, as follows: that the parties would abide by the award “of and concerning the said action, and also of and concerning all matters in difference between the said parties thereto.” Chief Baron Pollock said, “It imports to my mind that some notice should have been taken of the action and of the other matters separately, and that they should not have been lumped together, as they are in the present award;” and Baron Platt said, “I think that the parties intended to refer two matters to be awarded upon separately.” But both Chief Baron Pollock and Baron Rolfe expressed some doubt whether the award might not be good, and refused to grant the rule to enforce it, because, “as the matter was doubtful, they thought they ought not to grant the rule.”

**Awards of a Gross Sum under a Submission of Several Matters.**

<sup>1</sup> *Dolbier v. Wing*, 3 Greenl. 421; *In re Brown & The Croydon Canal Co.*, 9 Ad. & E. 522; *Cargey v. Aitcheson*, 2 B. & C. 170; *Ott v. Schroepel*, 1 Seld. 482; and see *Wrightson v. Bywater*, 3 Mee. & W. 199, in which several items were held well disposed of by a general finding.

<sup>2</sup> *Gray v. Gwennap*, 1 Barn. & Ald. 106.

<sup>3</sup> *Harrison v. Creswick*, 13 C. B. 399.

<sup>4</sup> *Rule v. Bryde*, 1 Exch. 151.

— Where divers matters in difference are submitted, an award of a gross sum of money, by way of determination of them all, is sufficiently final,<sup>1</sup> provided they are of such a nature that an award of this kind can reasonably be supposed to determine them.<sup>2</sup> It is true that the award must dispose for ever of all the matters submitted, and that an award of this nature does not show either what was submitted or how any specific matter was determined. But the first of these functions should be performed by the submission; and the second is not absolutely necessary to be performed at all. It is shown that certain matters were submitted; it is shown that an award intrinsically capable of disposing of them all has been rendered. The conclusiveness and finality are perfect, and are not impeached, as matter of law, by the necessity for going outside of the award to find out what was determined by it, or by the impossibility of discovering the opinion of the arbitrator upon any specific point.

See *post*, “Presumption that Award disposes of all Matters submitted.”

Where arbitrators are authorized to award damages already accrued by reason of the flowage of certain land, and also damages by way of compensation for the perpetual right to flow the land in the future, they may find a gross sum in discharge of both demands.<sup>3</sup>

**Award of a Particular Thing under a General Submission.**— If the submission be general, and the award be only of a particular thing, it will be presumed that this was the only matter in dispute,<sup>4</sup> especially if the award purport to be made of and concerning the matters submitted.<sup>5</sup> But this presumption is

<sup>1</sup> *Wrightson v. Bywater*, 3 Mee. & W. 199.

<sup>2</sup> *Aliter*, of course, if such an award cannot, logically, dispose of some of the matters submitted. *Randall v. Randall*, 7 East, 81.

<sup>3</sup> *Darge v. Horicon Mining Co.*, 22 Wis. 691.

<sup>4</sup> *Kleine v. Catara*, 2 Gall. 61; *Baspole's Ca.*, 8 Rep. 97 b; *Wyatt v. Curnell*, 1 Dowl. N. S. 327; *Strong v. Strong*, 9 Cush. 560; *Tallman v. Tallman*, 5 id. 325; *Hayes v. Forskoll*, 31 Maine, 112.

<sup>5</sup> *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482.

not conclusive ; and if it be shown as matter of fact that some other controversy was pending, embraced by the terms of the submission, and to which the attention of the arbitrators was called, the award is void.<sup>1</sup>

So where a submission was between A., as representative of the firm of A. & Co., and also on his individual account, of the one part, and B. of the other part, nothing was said in the award about individual claims of A. It was held, though the submission contained the *ita quod* clause, that the award was good. For *non constat* that A. had any individual claims, or that the arbitrators refused to pass on such. The presumption, being in favor of the award, was to the contrary.<sup>2</sup>

**Awarding on Different Pleas in an Action.** — In an action of debt, the defendant pleaded never indebted, and a set-off. The suit was referred, and the arbitrator found both pleas in favor of the defendant. Held, that the award, resting at this point, was not final. For it found that the defendant had a claim in set-off, and also that he had never been indebted to the plaintiff. It was obvious, therefore, that the plaintiff was now indebted to him ; yet the award, as it stood, failed to find the amount of such indebtedness, and to direct payment. It did not, therefore, dispose of the matter submitted.<sup>3</sup>

**An Award may be co-extensive with the Submission by Implication.** — An award may sometimes be co-extensive with the submission, and final, though it does not, in terms, pass upon and dispose of the main issue submitted, but leaves the decision of the arbitrators upon it to be gathered from implication. Thus, where a cause is submitted, it sometimes happens that the award does not contain any decision, save directions concerning the payment of costs. In this event, efforts have been made to vacate the award, on the ground that it does not

<sup>1</sup> Ott v. Schroepel, 5 N. Y. (1 Seld.) 482; Ingram v. Milnes, 8 East, 444, and cases above cited.

<sup>2</sup> Karthaus v. Ferrer, 1 Pet. 222. .

<sup>3</sup> Maloney v. Stockley, 2 Dowl. N. S. 122; and 4 Man. & Gr. 647; and see Fenton v. Dimes, stated in Williams v. Mouldsdales, 7 Mee. & W. 134.

pass upon and dispose of the chief matters submitted. But if a decision of these matters can be inferred from the orders given in relation to the costs, the award will be upheld as final by implication.<sup>1</sup> The causes illustrating this rule have been already fully recited in the chapter on \*Formalities, and need not therefore be repeated here.

**Awards seeking to do General Equity are often not final.** — An arbitrator, by departing from the strict question submitted, and attempting, instead of simply determining that, to do general equity concerning the subject-matter between the parties, runs serious risk of rendering an award which will not be final. Thus where there was an agreement for the sale of land, but the vendee questioned the vendor's title; and all questions relating to the agreement were submitted, the arbitrator awarded that the purchaser should accept the title, with such faults as pertained to it, and should receive an indemnity against them. The court held that the duty of the arbitrator was to determine whether the title was good or bad, and that his award, not being a final settlement of this question, was bad.<sup>2</sup>

So under a submission concerning the right, title, interest, and possession of certain land, an award that the defendant should have the brakes growing on it for his life, was held bad. The question of the property in the land was submitted, but was not determined by this award.<sup>3</sup>

**The Award must decide respecting all the Parties.** — The rule is that the award must decide respecting all the parties to the submission as well as respecting all the subject-matter. Thus a submission of all controversies between A. & B. of the one part and C. of the other part, would not, upon the sound theory, be satisfied by an award determining only contro-

<sup>1</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray, 418; *Rixford v. Nye*, 20 Vt. 132; *Hicks v. Gleason*, ib. 139; *Lamphire v. Cowan*, 39 id. 420.

<sup>2</sup> *Ross v. Boards*, 8 Ad. & El. 290; *Russell on Arb.*, 3d ed. p. 257.

<sup>3</sup> *Anon.*, *Dyer*, 242 a.

versies between A. and C., and omitting controversies between B. & C.<sup>1</sup>

In a chancery suit, instituted to enforce a pecuniary demand against the real and personal estate of a testator, all matters in difference between the parties were referred. The arbitrators ordered the executor, who was a defendant, to pay a certain sum to the complainants in full discharge and satisfaction of all demands against him or his testator; and also directed that certain other defendants, having interests under the will in the testator's real estate, should be at liberty to prosecute their claims against his estate in like manner as if no reference had been had. The court was of opinion that the order of reference contemplated the adjustment of the individual rights of all the parties to the suit, and not merely of such matters as were in controversy between the complainants on the one side and the defendants on the other. Inasmuch as this complete adjustment had not been provided by the award, it was held to be void.<sup>2</sup>

But where a claim between A. on the one side and B. & C. on the other side was referred, an award that B. should make a certain payment to A. was held good as against B., without regard to the objections which A. or C. might make to it as not finally disposing of the matter as between them; upon which latter point the court gave no opinion.<sup>3</sup>

**The Arbitrator need not award on Incidental Matters.**—The arbitrator need pass specifically only upon the main and substantial issue presented.<sup>4</sup> Incidental and collateral points need not be separately awarded upon in terms. For example, where disputes arose as to the rights and interests of parties under a deed of partnership, each party pressed upon the arbi-

<sup>1</sup> Russell on Arb., 3d ed. p. 257; Com. Dig. Arb., E. 5; Harris v. Paynter, Rolle's Abr. Arb., O. 8, p. 261.

<sup>2</sup> Turner v. Turner, 3 Russ. 494.

<sup>3</sup> Wood v. Adcock, 7 Exch. 468; but see Rees v. Waters, 16 Mee. & W. 263.

<sup>4</sup> Russell on Arb., 3d ed. p. 250; Richards v. Drinker, 1 Halst. 307; Harker v. Hough, 2 id. 428.

trator a different theory as to the construction of the deed. It was necessary for the arbitrator to put a construction upon the deed before he could proceed to make up his award. The court held that since the parties had not originally submitted the question of construction to him as a separate matter, and had not even at the argument demanded from him a specific finding upon it, he was not obliged to render any such specific finding. Having disposed of it in his own mind and awarded upon the rights and interests in dispute according to his opinion, he had fulfilled his duty in the premises.<sup>1</sup>

**Award of a Balance upon Money Claims.** — Where money is claimed upon divers distinct claims or various items of account on either or both sides, an award between the parties of a balance to be paid by either is generally taken to be co-extensive with the submission and to include and imply a determination upon each and all of the several matters involved in the controversy without a detailed account or other statement of those matters.<sup>2</sup>

Arbitrators to whom various items and demands upon each side had been submitted, enumerated several which they found in favor of the plaintiffs; they then found a specific sum in favor of the defendant, and directed that the amount of the items, enumerated in the preceding part of the award as credits to which the plaintiffs were entitled, should be deducted from this sum. The award was objected to because it did not state that any items had been rejected or disallowed, and it was argued that this showed that some of the items had not been taken into consideration or passed upon. But the court upheld the award, saying that the finding of specific credits in favor of the plaintiffs, and ordering their amount to be deducted from the gross sum found for the defendant, was equivalent to a rejection of all credits not enumerated.<sup>3</sup>

<sup>1</sup> *In re Keene & Atkinson*, Exch. Ap. 16, 1847; stated in *Russell on Arb.*, 3d ed. p. 250; and see *Giddings v. Hadaway*, 28 Vt. 342.

<sup>2</sup> *Emery v. Hitchcock*, 12 Wend. 156.

<sup>3</sup> *Carnochan v. Christie*, 11 Wheat. 446.

A building contract between N. and M. named a sum certain to be paid to the builder for building the house. Afterward the person for whom the house was built refused to pay the whole amount. The dispute was submitted by a bond reciting that "the said M. claims a deduction from the sum named in said contract, as the pay agreed upon," and that it was "mutually agreed to refer it to D. and W. to say what deduction shall be made in favor of said M., and what balance shall be due." The award stated simply a decision "that a balance of \$322.04 is due said N." Held, that the award was not void by reason of the failure of the arbitrators to declare specifically what deduction should be made from the sum named in the contract. By finding the balance due to N. they necessarily found what deduction should be made, and indicated it as clearly by stating the balance as if they had named it in figures.<sup>1</sup>

**Award of a Sum of Money under a General Submission.**— In like manner where a submission is in the most general form, of all demands and controversies whatever, and there is an award of a certain sum of money as a balance due from the one party to the other, it may well be taken as a full execution of the submission.

And by parity of reasoning, if under a particular submission, accompanied by a general submission, certain specific things be awarded, and also payment of a certain sum of money, the money payment will be intended to cover all other demands unless the contrary appear.<sup>2</sup>

**The Award need determine only such Matters as are brought to the Arbitrator's Notice.**— The rule requiring the arbitrator to pass upon every matter which the submission requires him to pass upon, or which could be included within it, is strictly limited, and obliges him only to pass upon all matters *presented* before him. For he is called upon to determine nothing

<sup>1</sup> Bigelow v. Maynard, 4 Cush. 317.

<sup>2</sup> Strong v. Strong, 9 Cush. 560.

to which his notice is not attracted by the one or the other party. Though there may be disputes in existence between the parties, which could properly be included under a submission and disposed of by the award, yet if these are not actually brought before the arbitrator, the fact that they are not decided by him will not invalidate the award.<sup>1</sup> The rule is said to be that an award is void when it appears either on the face of it or from intrinsic proof that the arbitrators had notice of any matter covered by the submission which they failed to decide.<sup>2</sup>

Chief Justice Shaw says that "the cases where an award has been held to be bad, as not being final, and not embracing all the matters submitted, are those where through mistake of their authority, or oversight, or other accident, the referees have neglected or refused to take into consideration and pass upon demands within their authority, and brought before them by one or the other of the parties."<sup>3</sup>

Russell says, "In order to invalidate the award for not deciding a particular question, the point must have been specifically stated."<sup>4</sup> Thus, an action of trespass for taking the plaintiff's goods as distress for rent was referred, with all matters in difference. The main question before the arbitrator was, whether the plaintiff became a tenant of the defendant on a certain day. This was satisfactorily determined; but another question — whether at the date of the order of reference a tenancy existed between the parties — was not determined. It appeared, however, not to have been specifically brought before the arbitrator, and the court therefore held that his failure to find upon it did not invalidate his award.<sup>5</sup>

<sup>1</sup> *Hodges v. Hodges*, 9 Mass. 320; *Karthus v. Ferrer*, 1 Pet. 222; *Ott v. Schroepel*, 1 Seld. 482; *Hewitt v. Furman*, 16 Serg. & R. 135; *Middleton v. Weeks*, Cro. Jac. 200; *Elsom v. Rolfe*, 2 Smith, 459; *Hawksworth v. Brammall*, 5 M. & Cr. 281.

<sup>2</sup> *Moore v. Cockcroft*, 4 Duer, 133.

<sup>3</sup> *Warfield v. Holbrook*, 20 Pick. 531.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 250.

<sup>5</sup> *Rees v. Waters*, 16 Mee. & W. 263; and 4 Dowl. & Low. 567.



In *Karthauss v. Ferrer*<sup>1</sup> it was said: "But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them."

**Notice by the Recitals of the Submission.**—The last-named case furnishes some ground for saying that it is not essential that either party should actually present a specific claim before the arbitrators in order that their attention should be so far attracted towards it as to oblige them to decide it. For if the claim is specifically stated in the submission, such statement is sufficient for this purpose. The language of the court is, "The question, then, is, does it distinctly appear, from the face of the submission, that any other point of difference between the parties was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine." The submission was between "K., acting for his late house of K. & Co., and for himself and the above-named F." The award adjudged that the late firm of K. & Co. pay a certain sum, and said nothing about K. individually. The court said, "It shall not be intended that there were any controversies with K. individually other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *aliunde*, that they were brought before the referees." But the court showed that in this case it could make no difference to K. whether he was directed to pay as an individual or as a member of the late firm. If a person does submit in separate characters or capacities, and it is essential to know in which character or capacity he is directed to make the payment, but the award was silent upon

<sup>1</sup> 1 Pet. 222.

the subject, the omission would be fatal,<sup>1</sup> but whether on the theory that it did not decide all the matters submitted, and to which the attention of the arbitrators was actually called by the submission, is doubtful. The language of Chief Justice Marshall is, "There is certainly a want of precision in this part of the award, which exposes it to solid objection, and might subject D. to serious inconvenience."

Judge Dewey construed the case of *Houston v. Pollard*<sup>2</sup> to the same effect, saying, in general terms, that in that case it was holden "that where it appears upon the face of the submission that various distinct matters in controversy are the subjects of the submission, and the particular subjects are recited, each of those subjects must be passed upon by the arbitrators and noticed in their award, or the award will not be valid."<sup>3</sup> But this *dictum* is deprived of much of its force by an examination of the case referred to by the learned judge, in which it is by no means ruled that the mere recital in the submission obliges the arbitrator to notice the matter in his award, *even though it has not been presented* by either party at the hearing. This aspect of the question was not put before the court.

In *Hewitt v. Furman*<sup>4</sup> the submission was of "a matter in dispute between us relative to a certain grist-mill and five acres of land, on which the said mill stands, together with all books, accounts, debts, and demands, of whatsoever name or nature." The award, which mentioned only the grist-mill and land, was objected to, because it was wholly silent as to books and accounts. But the fact that such were mentioned in the submission was not regarded as sufficient to invalidate the award in the absence of proof of their having been actually laid before the arbitrators by the parties.

Yet it would seem as though instances might occur in which

<sup>1</sup> *Lyle v. Rodgers*, 5 Wheat. 394.

<sup>2</sup> 9 Metc. (Mass.) 164.

<sup>3</sup> *Leavitt v. Comer*, 5 Cush. 129.

<sup>4</sup> 16 Serg. & R. 135.

it would be just and reasonable to build a presumption upon the doctrine of withdrawal. If a submission should recite controversies concerning entirely separate matters, as, for example, concerning the title to a house and the title to a ship, and the parties should offer evidence and arguments as to the house only, and should rest at that point, neither of them making any mention of the ship, and not having produced any evidence whatsoever bearing upon the title to the ship, such conduct might be regarded as satisfactory evidence of a withdrawal of the controversy concerning the ship from the consideration of the arbitrators. But I find no authorities to this precise point.

**The Recitals of the Award may prove Notice.** — Mention of a matter in the award itself constitutes sufficient evidence of its having been brought to the notice of the arbitrators. In *Wright v. Wright* the award began with the statement by the arbitrators that “we do, in the first place, say that we do not take into consideration the house and shed nor pass no order upon it;” also, the defendant in his plea averred that the arbitrators were asked to decide about this. The court held that this remark in the award sufficiently showed that the arbitrators had notice of the house and shed as a matter in controversy, and having failed to pass upon it their award was void.<sup>1</sup>

**Silence of the Award on an Undecided Matter.** — It is not, however, necessary that the award should mention the matter not determined. If, in point of fact, any matter which ought to be disposed of by it is not so disposed of, the award will be as void as if it expressly professed to except this matter.<sup>2</sup>

The recitals of the submission showed an obligation upon the arbitrators to determine all actions and controversies, and also to ascertain what rent should be paid by the plaintiff. They found a balance due from the defendant, but they gave no direc-

<sup>1</sup> *Wright v. Wright*, 5 Cow. 197.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 253.

tion whatsoever concerning the rent. The court held the award to be altogether void by reason of this omission.<sup>1</sup>

Again, in a dispute upon a building contract the arbitrators were required to award on alleged defects in the building, on claims for extra work, and deductions for omissions, and to ascertain what balance, if any, might be due to the builder in respect of the extras and omissions. They awarded that a gross sum should be paid to the builder, and should be received by him in full compensation and satisfaction of all the matters in difference. The court held the award bad, inasmuch as it left undecided the question as to the alleged defects, and also left it doubtful whether the sum awarded was to be applied in discharge of the extra work, or to a general balance of accounts.<sup>2</sup>

**A Party not injured by the Defect cannot avoid the Award.**—A party cannot avoid an award on the ground that the arbitrators have not passed upon some one of several matters submitted, unless the objector has himself been placed at some loss or disadvantage by reason of this neglect. If the omission has really operated for his benefit, as, for example, if it were of a claim held by the other party against him, and as to which the award will act as a bar, he has no ground of complaint.<sup>3</sup>

In an arbitration between A. and B., A. demanded that B. should bring forward and present before the arbitrators his claim against A. upon a certain note. B. refused to do so, on the ground that it was a demand against A. and another person jointly, and not between the parties to the submission. A. then objected to the award because this demand was not included and disposed of by it. The court refused to entertain the objection. The award was final as to every thing which the parties saw fit to bring before the referees. If the note aforesaid was not embraced in the terms of the submission, then the

<sup>1</sup> *Randall v. Randall*, 7 East, 81.

<sup>2</sup> *In re Rider v. Fisher*, 3 Bing. N. C. 874; and see *Houston v. Pollard*, 9 Metc. (Mass.) 164, stated at length, *post*, in this chapter.

<sup>3</sup> *Davy's Ex'rs v. Faw*, 7 Cranch, 171; *Warfield v. Holbrook*, 20 Pick. 531.

referees could not pass upon it, as it was not within their authority. If, on the other hand, it was embraced in the submission, then the award and judgment upon the award would be a bar to any suit which B. could bring upon it against A.<sup>1</sup>

**Method of availing of the Objection that the Award is not co-extensive with the Submission.** — The practice appears to be universal to allow the fact that the arbitrators have not passed upon all the matters submitted, and to which their attention was drawn, to be availed of as a defence in a suit at law upon the award, or upon the bond for the performance of the award.<sup>2</sup>

If the award be returnable into court, the same defect may be alleged as an objection to granting a motion or application for the entry of judgment on the award.<sup>3</sup>

In *Mitchell v. Staveley*,<sup>4</sup> the submission was general of all matters in difference between the parties. The plaintiff declared in debt on the arbitration bond. The defendant pleaded in bar that a certain matter which the arbitrators were bound to decide was not included or determined by the award. He was allowed to introduce evidence in support of the plea, and the court, being satisfied of the omission, gave judgment for the defendant.

**Rules of Evidence.** — Parol evidence is admissible to show that matters embraced in the submission were brought to the notice of the arbitrators and not determined by the award.<sup>5</sup>

In proceedings under a bill in equity, seeking specific performance of an award concerning the dissolution of a partnership, the arbitrators were permitted to testify concerning what matters were presented before them, and even whether or not they had decided all the matters referred.<sup>6</sup>

<sup>1</sup> *Warfield v. Holbrook*, 20 Pick. 531.

<sup>2</sup> See, for example, *McNear v. Bailey*, 18 Maine, 251; *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482; *Bhear v. Harradine*, 7 Exch. 269.

<sup>3</sup> *Warfield v. Holbrook*, 20 Pick. 531.

<sup>4</sup> 16 East, 58.

<sup>5</sup> *McNear v. Bailey*, 18 Maine, 251; *Mitchell v. Staveley*, 16 East, 58.

<sup>6</sup> *Hawksworth v. Brammall*, 5 M. & Cr. 281.

**Presumption that the Award disposes of all Matters presented. —** The court always wish to uphold the award, and consequently make every reasonable intendment, and entertain every presumption in its favor.<sup>1</sup> Accordingly, it will always be presumed that the arbitrators passed upon all matters presented before them by either party, and upon nothing more, unless the contrary is apparent upon the face of the award.<sup>2</sup> If the award in terms purports to determine all the matters submitted, it is considered to do so, provided that by any reasonable construction it can be so taken. If the award professes to be made *de et super præmissis* ("of and concerning the premises"), or contain any phrase which can be construed as an expression by the arbitrator of his intention to decide every thing brought to his notice, it purports to be final. Thus, an award written on the back of the arbitration bond, stating that the arbitrators "met . . . on the within business and agreed," purports upon its face to be an award *de et super præmissis*.<sup>3</sup> So, also, does an award in which the arbitrators state that they have "carefully considered all accounts and statements presented."<sup>4</sup>

A general award, purporting to be "in full of and for all matters submitted," will be upheld as having decided every thing brought to the notice of the arbitrators, provided that this be logically possible.<sup>5</sup>

Where the submission was of all demands, and counter-claims were presented by the defendant, an award of a sum

<sup>1</sup> Strong v. Strong, 9 Cush. 560; Tallman v. Tallman, 5 id. 325; Hayes v. Forskoll, 31 Maine, 112; Ott v. Schroepel, 1 Seld. 482; Wright v. Wright, 5 Cow. 197; M'Kinstry v. Solomons, 2 Johns. 57; 13 id. 27; Karthaus v. Ferrer, 1 Pet. 222; McNear v. Bailey, 18 Maine, 251; Hewitt v. Furman, 16 Serg. & R. 135; Wood v. Griffith, 1 Swanst. 43; Hawkins v. Colclough, 1 Burr. 275; Doe d. Madkins v. Horner, 8 Ad. & El. 235; Stonehewer v. Farrar, 9 Jur. 203.

<sup>2</sup> Sperry v. Ricker, 4 Allen, 17; Parsons v. Aldrich, 6 N. H. 264; Hodges v. Hodges, 9 Mass. 320; Strong v. Strong, 9 Cush. 560; Caton v. MacTavish, 10 Gill & J. 192.

<sup>3</sup> Dolbier v. Wing, 3 Greenl. 421.

<sup>4</sup> Lamphire v. Cowan, 39 Vt. 420.

<sup>5</sup> Bowman v. Downer, 28 Vt. 532.

named in favor of one party, "and the same is in full of all matters referred," was held to be good.<sup>1</sup>

**This Presumption is not conclusive.** — But though an award should purport in the most distinct manner to decide all matters brought to the notice of the arbitrators, yet this statement is by no means conclusive. It will always be open to an objecting party to show that in fact a specific matter has been submitted and presented, and cannot by any reasonable construction of the award be taken to be included and determined by it.<sup>2</sup>

**Burden of Proof.** — The burden of proof rests upon the party who asserts that the award is not co-extensive with the submission. He must show affirmatively that there were matters included in the submission, and presented before the arbitrators, which it is logically impossible that the award should dispose of, or which, as matter of absolute fact, have not been determined.<sup>3</sup>

**Adjudications exemplifying the Rule of Favorable Presumption.** — Where a submission mentions several specific matters, and the award determines some of them, but is silent as to others, it will be presumed, in the absence of proof to the contrary, that the omitted points were not brought to the notice of the arbitrators. The award will therefore be sustained.<sup>4</sup> A more satisfactory shape in which to put the presumption might perhaps be found, for it is somewhat difficult to say that a dispute specifically described in the submission is not brought to the arbitrator's notice. But whatever may be the shape which the exigencies of one or another case may make it convenient for the presumption to assume, in some form it is always found wherever it is reason-

<sup>1</sup> *Harden v. Harden*, 11 Gray, 435; and see *Creswick v. Harrison*, 10 C. B. 441 (overruling *Gyde v. Boucher*, 5 Dowl. 127); and *Duke of Beaufort v. Swansea Harbor Trustees*, 29 L. J. C. P. 241; 8 C. B. N. s. 156.

<sup>2</sup> *Mitchell v. Staveley*, 16 East, 58; *Randall v. Randall*, 7 East, 81.

<sup>3</sup> *Sperry v. Ricker*, 4 Allen, 17; *Leavitt v. Comer*, 5 Cush. 129.

<sup>4</sup> *Hewitt v. Furman*, 16 Serg. & R. 135.

ably possible.<sup>1</sup> For example, it was held in a Massachusetts case, that if it be logically possible that a demand was considered in making up the award, it will be presumed that this was done.<sup>2</sup>

If the submission be of a cause and of all matters in difference, and the award determines the cause only without mentioning any other matters of dispute, it will be presumed that there were no such other matters, beyond those included in the clause, and the award will be upheld.<sup>3</sup>

Arbitration bonds were entered into on December 28, 1842, by which it was submitted to the arbitrators to determine what amount had been actually paid under a certain contract. Their finding was that a certain sum had been paid "up to the first day of January, in the year 1841." An effort was made to set aside the award on the ground that the arbitrators had not passed upon the whole of the matter submitted, since they had said nothing of payments made between January 1, 1841, and the date of the submission. But the award was upheld upon the strength of the English cases. Paige, J., said: "These authorities tend to show that in this case the court is authorized to presume that there were no payments made between the first day of January, 1841, and the date of the submission bonds; or that, on the latter day, there was no matter in controversy depending in relation to payments on the contract, which was not depending on the 1st January, 1841. This is not the case of an omission to determine a distinct matter specifically submitted. Here the arbitrators actually pass upon the matters submitted. They say in their award that they have heard the proofs and allegations of the parties and examined the matter in controversy by them submitted in the bonds of submission; and then they find that the whole

<sup>1</sup> See *Craven v. Craven*, 7 Taunt. 642; *Gray v. Gwennap*, 1 Barn. & Ad. 106; *Hayllar v. Ellis*, 3 N. & P. 553; *Harrison v. Lay*, 13 C. B. n. s. 528.

<sup>2</sup> *Hodges v. Hodges*, 9 Mass. 320.

<sup>3</sup> *Day v. Bonnin*, 3 Bing. N. C. 219; *Wynne v. Edwards*, 12 Mee. & W. 708.



amount paid on the contract up to January 1, 1841, is \$530.62. They declare that they have passed upon all the matters submitted, and find the amount paid to that day. It seems to me, under the rule that every reasonable intendment must be made to uphold an award, that in this case we must intend that no more than the sum indorsed on the contract had been paid up to the date of the bonds of submission, and that the arbitrators embrace in their finding the whole period down to that time."<sup>1</sup>

**Favorable Presumption in Cases of Doubt.**—A submission between partners was not upon its face entirely certain as to whether or not the parties originally intended to submit any other demands than such as were in some way connected with their copartnership. The recital of the matters inducing the submission, which preceded the enumeration of matters submitted, authorized the inference that it was with reference solely to partnership concerns. The subsequent part of the submission was broad enough to authorize the construction that it embraced all demands between the parties. The award disposed only of matters growing out of the partnership, and was objected to on this ground. But the court overruled the objection, in the absence of any evidence that there in fact were in existence private demands outside of the partnership controversies.<sup>2</sup>

**A Case where the Favorable Presumption was not admitted.**—It was submitted to arbitrators to determine between A. & B., 1st. Whether A. had finished a certain house according to his contract with B. ; what, if any thing, remained to be done by him upon it; how much, if any thing, remained to be paid by B. to A. ; what damage, if any, should be allowed to B. for failure to fulfil the contract. 2d. What amount, if any, remained to be advanced by B. to A. ; and what, if any thing,

<sup>1</sup> *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482; and see *Ward v. Unicorn*, Cro. Car. 216; *Busfield v. Busfield*, Cro. Jac. 577; *Barnes v. Greenwell*, Cro. Eliz. 858.

<sup>2</sup> *Leavitt v. Comer*, 5 Cush. 129.

to be done upon another house by A. to finish it according to another contract between him and B. The parties stipulated to perform, respectively, whatever the arbitrators should order. The award was only that B. should pay a certain sum to A. in fulfilment of the first contract aforesaid, and that a certain sum remained to be advanced by B. to A. in fulfilment of the second contract. The award in terms purported to be "of and concerning the premises and the whole subject-matter thereof;" but it was nevertheless set aside, because the arbitrators had not found whether any thing remained to be done towards completing the houses or either of them. Chief Justice Shaw said, "We take the rule to be, that when the claims on both sides are for debts, or pecuniary claims, or for damages capable of being liquidated, ascertained, and reduced to a sum certain, if the arbitrators, professing to decide on the whole subject, find a balance due from the one to the other, such an award is final and conclusive, although the particulars from which that balance resulted are not stated." In this case, "Even if it was within the arbitrators' authority to find damages for the non-performance of the contracts," instead of "directing a specific performance of the contract by making good the deficiencies, yet it was clearly within their authority to direct such things to be done specifically; and the parties stipulated to do and perform what should thus be directed. Now this award, finding a balance on the pecuniary claims, leaves it wholly uncertain whether the arbitrators decided on the fact that there were or were not any such deficiencies, and, if there were, that they allowed any compensation for them in damages, in stating the balance of the account. We think it would be carrying the doctrine of intendment too far to assume that they decided against all claims for specific performance on both sides, merely because they have said nothing on the subject." The award is not sufficiently clear, as to what has and what has not been passed upon, to prevent future controversy and litigation; and it could not, for the same reason, operate as a bar, should

an action be brought on the original contract for alleged breaches, in the non-performance of its stipulations.<sup>1</sup>

**Award in Fact but not apparently co-extensive with the Submission.**—An award may sometimes not be co-extensive with the submission in appearance when it is so in fact. For the award need only cover matters in dispute, question, or doubt between the parties, to which the attention of the arbitrators is called; and if the submission, by reason of being loosely or largely worded, would include more matters, yet these need not be passed upon by the arbitrators.<sup>2</sup> The example given by Mr. Kyd<sup>3</sup> is that of a submission of all actions, real and personal, and an award only concerning personal actions, which will be good, provided that, as matter of fact, no real actions are pending between the parties. It is possible also that the decision of one point may, as matter of necessity, include or draw after it the decision of other points which will not therefore be specifically mentioned.

**Presumption that the Award does not include Matters not submitted.**—If the submission be broad enough to include any thing, and the arbitrators profess to base their award on the proofs and allegations of the parties, the court will presume that they have not decided matters not in dispute.<sup>4</sup> The presumption always is, that nothing has been decided beyond what was submitted and presented; and the *onus* of proof rests upon the party who asserts that the arbitrators have gone beyond these matters.<sup>5</sup>

**Presumption based on Award of Mutual Releases.**—Russell lays down the established rule in England to be, that if, on submission of a cause and all matters in difference, the arbi-

<sup>1</sup> *Houston v. Pollard*, 9 Metc. (Mass.) 164; and see *In re Rider & Fisher*, 3 Bing. N. C. 874; stated *ante*, p. 360.

<sup>2</sup> *Jackson v. Ambler*, 14 Johns. 96.

<sup>3</sup> Kyd on Award, 172.

<sup>4</sup> *Byers v. Van Deusen*, 5 Wend. 268.

<sup>5</sup> *Byers v. Van Deusen*, 5 Wend. 268; *Caton v. MacTavish*, 10 Gill & J. 192; *Sperry v. Ricker*, 4 Allen, 17.

trators award that the one party shall pay to the other a sum of money, and that mutual and general releases shall be executed, the award will be taken to be a disposition of all the several matters submitted, although it does not embody any adjudication upon some specific matters presented at the hearings; as, for instance, on particular liabilities of the parties with respect to some bills of exchange, or on the liabilities in an action between them. For by the award of general releases, the arbitrator "must be deemed to have taken into consideration these particular matters in difference, since the releases would operate as a final determination respecting them."<sup>1</sup>

But, he adds, where the arbitrator stated on the face of his award that he had, for reasons which the court held untenable, refused to arbitrate on certain claims within the scope of the submission, his proceeding to direct the parties to execute mutual general releases respecting the matters submitted was not allowed to cure the defect, by reason of the gross injustice which would ensue regarding the omitted claims, in case the award should not be set aside.<sup>2</sup>

It is apprehended also that, by parity of reasoning, the same result would follow if, in the absence of any express exception by the arbitrator, it should nevertheless appear on the face of the award that it was not logically capable of disposing of some of the matters submitted, or if the fact of such non-determination should be established by extrinsic proof.

<sup>1</sup> Russell on Arb., 3d ed. p. 257; *Birks v. Trippet*, 1 Saund. 32; *Wharton v. King*, 2 Barn. & Ad. 528; *Addison v. Gray*, 2 Wils. 293.

<sup>2</sup> Russell on Arb., 3d ed. p. 258; *Bowes v. Fernie*, 4 M. & Cr. 150; and see *Wilkinson v. Page*, 1 Hare, 276.

## CHAPTER XII.

### THE AWARD MUST BE ENTIRE AND POSSIBLE.

Meaning of the phrase "entire."

There can be but one award.

Two certificates in cross-actions.

Separate awards embodied in one instrument.

The award need not be all contained in a single instrument.

The award may refer to extrinsic documents.

An award on which judgment is to be rendered must be complete in itself.

Marginal notes on an award.

Special power to make separate awards.

An award must be possible.

**Meaning of the phrase "Entire."** — It is an imperative rule that the award must be entire ; but it is difficult to define with clearness and precision what is the real force and meaning of this requisition. It seems to be a demand for unity and completeness. There can be but one award, and that award must be perfect and complete. Russell says that "the arbitrator can make but one award. This must be one entire and complete instrument in itself ; therefore if it be made part one day and part at another, though each and every part be made within the time limited for the award, it will be void."<sup>1</sup> It is not, of course, to be conceived that this language is intended to affect the formal or manual labor of drafting the award. It is probably rather to be understood as a prohibition of any severance of the award into parts, of which one shall be concluded upon one day, and another upon a later day. And it is stated that arbitrators may "assemble and consult and form their final determination on specific matters at several days ; but their

<sup>1</sup> Russell on Arb., 3d ed. p. 247 ; Com. Dig. Arb., E. 16 ; Rolle's Abr. Arb., H. 1, 2, p. 250 ; Gould v. Staffordshire Potteries Water-works Company, 5 Exch. 214, at p. 223.

award, which expresses their final determination on all the matters together, must be one and entire.”<sup>1</sup>

**There can be but One Award.**—A cause and all matters in difference between A. and B. were referred. Subsequently, and after this first reference had begun, another order was made, by which it was directed that C. should be made a party to the reference, as if he had been an original party; and that a cause between A. and C., and all matters in difference between A., B., and C., each and every of them, jointly and severally, should be referred to the same arbitrator. The arbitrator made two awards, in one of which he awarded that A. was indebted to B., without mentioning C.; in the other he awarded that A. was indebted to C., without mentioning B. Both awards were held to be bad, because there was no one award determining all the matters in difference between the parties. The second order of reference consolidated both the causes, and the arbitrator “should have decided in one award the two causes referred to him.”<sup>2</sup>

**Two Certificates in Cross-actions.**—An exception to the strictness of the foregoing rule was very reasonably allowed to obtain where an arbitrator was called upon to certify on cross-actions between the parties. He made a separate certificate in each action on a separate piece of paper. It was objected that the arbitrator had power to make only one certificate. To which objection, said the court, “the answer is, that it may be intended that the papers were made at the same time; and if so, they would be one instrument, containing the decision of each cause, written on separate papers for the purpose of being applied to the separate clauses.”<sup>3</sup>

**Separate Awards embodied in One Instrument.**—It will be observed that in the United States the strictness of the English principles, laid down and exemplified in the foregoing paragraphs, has been very much relaxed.

<sup>1</sup> Russell, *loc. cit.*; Com. Dig. *loc. cit.*; Rolle’s Abr. Arb., H. 3, p. 250.

<sup>2</sup> Winter v. Munton, 2 Moore, 723.

<sup>3</sup> *In re Smith v. Reece*, 6 Dowl. & Low. 520.

The case of *Kendrick v. Tarbell* is very badly reported, but from the statement and opinion it may be gathered that there were several distinct matters in difference between the parties ; that all were submitted together, and that the parties bound themselves to fulfilment of " the award ;" that the arbitrators found separately upon each one of these several matters ; that they drew up apparently a single instrument, but that in that instrument they kept each finding separate, and spoke of each finding as an award in itself ; so that the one document contained what in terms purported to be seven different awards ; whereas, in the absence of this phraseology, the whole instrument would probably and naturally have been regarded as constituting a single award, in seven different articles. The court contented itself with saying, *per* Redfield, C. J., that " the bond seems to us to oblige the defendant to pay all the awards, or to pay the ' *award* ' against defendant, which the arbitrators should make upon the matters submitted. And these five awards are but the detail of ' the award ' which the submission seems to have contemplated, and we do not perceive how the award is in any sense invalidated because the decision upon each claim is stated in detail." <sup>1</sup> It will be observed that the doctrine of entirety, though it might properly have been regarded as the basis of the discussion, was not clearly or directly touched upon at all ; but the orders of the arbitrators were upheld, and the question whether they were embodied in one award or distributed between seven separate awards was regarded as immaterial.

**The Award need not be all contained in a Single Instrument. —** The departure from the rigid rule which was made in the case of *In re Smith v. Reece* <sup>2</sup> has been carried to a much greater extent in New York, as the following case will show. Parties executed arbitration bonds submitting to arbitration, first, the amount which had been actually paid upon a certain contract

<sup>1</sup> *Kendrick v. Tarbell*, 26 Vt. 416.

<sup>2</sup> 6 Dowl. & Low. 520, stated *ante*, p. 370.

which in justice should be applied thereon, said amount so found to be indorsed on said contract; second, of and concerning all actions, &c., and all other matters, &c. (excepting a slander suit); "so as the said award be made in writing subscribed by [the arbitrators] or any two of them, and attested by a subscribing witness, ready to be delivered to the parties on or before the first day of February then next." The arbitrators made an award concerning the actions and other matters, which was duly signed by two of them and witnessed, and at the same time they indorsed upon the contract the following: "The whole amount which has been paid actually on the within contract up to the first day of January, in the year 1841, is, and by our award amounts to, the sum of \$530.62," &c. This was signed by three arbitrators, and the signatures of two of them were witnessed. In suit on the award it was insisted that the indorsement on the contract was not an award. The court, however, held otherwise, saying, *per* Paige, J., "The indorsement on the contract may be regarded as a part of the principal award. The indorsement and the award were simultaneous acts of the arbitrators. Having been made at one and the same time, they must be considered as constituting but one instrument, and must be construed as such." If the substance of the indorsement had been incorporated in the principal award, or indorsed upon it, it would have been unobjectionable in form. "The indorsement, on the contrary," was said to be "good as a distinct award." And directly afterward it was said that "the arbitrators in this case, in the indorsement on the contract made and signed by them, adjudicate that the amount paid on the contract . . . is \$530.62, and to indicate that this indorsement is made and signed by them as a separate award, or as a part of the principal award, they declare that the amount so paid 'by our award amounts to \$530.62.'" <sup>1</sup> It will be observed that in this case, on the strength of English authorities, the simultaneous writing and execution of the

<sup>1</sup> Ott v. Schroepfel, 5 N. Y. (1 Seld.) 483.



principal award and indorsement are regarded as an essential element, going to sustain the latter. And the court, having evidently resolved that they would at any rate sustain the indorsement, and not being inclined to be too particular as to the theory so long as this end should be gained, indicate a willingness to treat it either as a part of the "principal award," so called, or as an independent award. It cannot be both, but the court thinks it may be either, and, without showing any partiality, simply declares it good. It is noticeable, too, that no stress appears to be laid upon the proviso inserted in the bond, for an indorsement upon the contract of the finding concerning it; though it is not easy to see why this was not reasonably to be construed as equivalent to a deliberate stipulation by the parties for two awards, one of which should be made in a peculiar manner.

An award was accompanied by a paper entitled "General Result," which contained a sort of summary of the calculations by which the arbitrators had ascertained the amount of indebtedness between the parties. In proceedings to set aside the award on the ground of mistake, the court held that "this paper might be considered, for the purposes of the present inquiry, as part of the award."<sup>1</sup> But it is added in a foot-note that "the rule does not appear to be very clearly settled as to how far extrinsic statements by arbitrators shall be received to impeach their award," citing some Massachusetts cases.<sup>2</sup> And it is obvious that the foot-note touched the real principle, and that the language used by the court was lax in the extreme. An explanatory paper, letter, or other instrument has been sometimes allowed to invalidate an award, because it furnishes evidence of error in the award; and the courts have treated it in the same manner as if the error appeared on the face of the award itself. But this is different from holding that two separate and distinct instruments make one award.

<sup>1</sup> *Bell v. Price*, 2 Zab. 578.

<sup>2</sup> *Ward v. American Bank*, 7 Metc. (Mass.) 490; *Jones v. Boston Mill Corporation*, 6 Pick. 154.

**The Award may refer to Extrinsic Documents.** — An award may refer to some other document or instrument, as a report of a board of commissioners, a deed, &c., provided such paper be accessible and be described with sufficient certainty.<sup>1</sup>

A building contract provided that in case any alteration should be made in the form, &c., of the work, and the parties should not agree as to the price, there should be an appraisal by arbitrators. Arbitrators were called in, and recited in their award that having been chosen to examine and value the extras, &c., “as provided for in the contract for said buildings between, &c., dated, &c.,” they did determine, &c. It was held that the articles of the contract, being thus expressly referred to in the award, must be read and considered as if recited at length in it.<sup>2</sup>

**An Award on which Judgment is to be rendered must be complete in itself.** — Referees, after various recitals of their doings, stated, “A duplicate statement of proceedings relating to our award we have delivered to each of the parties: We have considered the purchase of the A. property as a partnership transaction, and have adjusted the same as will appear by said statement.” The award was held void, as being “imperfect and uncertain as to the extent of it, and the final result of the action of the referees. . . . Whatever of the doings of the referees, in the matter of making their award, is borne only upon the duplicates thus delivered to the parties, is not so distinctly set forth in the award as to be acted upon by the court to which the award is returned for acceptance. If, upon a submission and award at common law, such statements, furnished to the parties, might be considered sufficient, as bringing directly to their knowledge the nature and extent of the award, yet such a course of proceeding will not do, in a submission under the statute. . . . This

<sup>1</sup> *Santee v. Kleister*, 6 Binn. 36; *Brickhouse v. Hunter*, 4 Hen. & Munf. 363; *Henrickson v. Reinback*, 33 Ill. 299; but see *post*, in the chapter entitled “The Award must be certain,” the paragraph, Award referring to Extrinsic Instruments.

<sup>2</sup> *Butler v. Mayor, &c., of New York*, 1 Hill, 489. The decision of the Supreme Court in this cause was subsequently reversed (see 7 Hill, 329); but I do not see that the reversal overrules the above doctrine.

award has no efficacy until accepted by the court; and every thing that enters into the award must, from the nature of the case, be borne upon the award returned to the court; and if not so done, it cannot be legally accepted by the court, and made the foundation of a judgment against the party to be charged thereby.”<sup>1</sup>

**Marginal Notes on an Award.** — In the margin of an award was written: “G. P. is to give up the note which he holds against N. S. & Co. The store remains joint property. The outstanding debts to be equally divided.” The court were of opinion that these words were “to be considered as part of the award, and to receive the same construction as if they had been inserted in the body of the instrument. The words form a distinct sentence, and the meaning is the same, whether they be read in one place or another, after any distinct sentence. Besides, these words are merely explanatory of what would have been the operation and effect of the award, if they had not been inserted.”<sup>2</sup>

**Special Power to make Separate Awards.** — The same parties may enter into two distinct submissions concerning separate matters before the same arbitrators; and the awards, if they contain in themselves nothing to the contrary, will be in every respect wholly independent of each other.<sup>3</sup>

So, also, the parties may specially empower the arbitrators to make separate awards. The determination of distinct matters may then be distributed among distinct awards, each one of which, being complete in itself as a finding upon an independent matter, will be final and binding from the time of its execution.<sup>4</sup>

**An Award must be possible.** — An award ordering an impossible act or thing is necessarily bad. Such is the old rule.

<sup>1</sup> Day v. Laffin, 6 Metc. (Mass.) 280.

<sup>2</sup> Platt v. Smith, 14 Johns. 368.

<sup>3</sup> Fay v. Bond, 1 Allen, 211.

<sup>4</sup> Russell on Arb., 8d ed. p. 248; Dowse v. Cox, 3 Bing. 20; Wrightson v. Bywater, 3 Mee. & W. 199.

But it seems that the impossibility must be of that description that its existence is apparent upon the face of the award itself, or so soon as the act or thing is named. Russell says that an award of a "thing impossible *ex natura rei*" is void. The old examples are an order for the payment of money or surrender of an estate at a day already past. These orders, being obviously and in the nature of things impossible of performance, are therefore necessarily null.<sup>1</sup>

But to order a man to pay "twenty pounds when he has not twenty pence," is in one sense of the word an equal impossibility. Yet, since it is not obvious and inherent in the very order itself, it is not of such a description as will render the award void. The debt will be created, though it may not be collectible.<sup>2</sup>

If the act or thing ordered be possible at the time when the award takes effect, but afterward becomes impossible, whether by the act of the party ordered to perform it or of a stranger, the obligation of performance is not discharged.<sup>3</sup>

It seems that absolute impossibility is not necessary in order to avoid the award, but impossibility within what may be regarded as the reasonable limits of a man's power. Thus, it is said that an order, that a person should turn aside the course of the river Thames would be void, since it would be presumed not to be within his power.<sup>4</sup> And this must unquestionably be good law; though as it is possible to conceive of instances in which a direction to a party to deflect the course of a stream might be both possible and proper, so it is difficult to lay down, either in abstract phraseology, or even by the aid of examples, the rule concerning this description of what may be called presumable impossibility.

<sup>1</sup> Russell on Arb., 3d ed. p. 288; Com. Dig. Arb., E. 12; Rolle's Abr. Arb., E. p. 248, and F.; Bacon's Abr. Arb., E. 4; Colwell v. Child, Ca. in Chy. 86.

<sup>2</sup> Ibid.

<sup>3</sup> Russell on Arb., p. 288; Com. Dig. Arb., E. 12.

<sup>4</sup> Bac. Abr. Arb., E. 4; Co. Lit. 206.

## CHAPTER XIII.

### THE AWARD MUST BE MUTUAL.

Force of the requirement of mutuality.

Award ordering releases is mutual.

Award of payment to one only of two joint creditors.

Force of the word "for" in an award of payment.

Award under a submission by an agent.

If a party is not bound by the award, it is not mutual.

Force of a stipulation concerning releases, contained in the submission.

An award neglecting to order a conveyance of real estate.

Awards may be mutual by implication.

Order that a party pay a debt to a stranger.

**Force of the Requirement of Mutuality.**—Mutuality is an essential characteristic of an award. But the ancient rigor of interpretation concerning this trait has been much relaxed in modern times. The old and unquestionably sound theory was that "awards must not be on one side only; that they are void unless something be arbitrated for the defendant's benefit as well as for the plaintiff." Thus, if in a controversy between A. and B. it was awarded that B. should pay to A. a certain sum, it was considered that it ought, on the other hand, to be awarded for the benefit of B. that this payment should be in full discharge of his indebtedness, or that A. should execute a release to him upon receiving the sum. The difference between the old and the new cases is not so much in the theory or general rule as it is in the operation given to it. Thus in old times it would have been held that the award was not mutual unless it contained a discharge of B. in express terms, or ordered the release, or said for what the money was to be paid, or purported to be *de et super præmissis*. Otherwise it was considered that there might be danger that it would not sufficiently appear what demand was satisfied and

acquitted by the payment when made.<sup>1</sup> But the recent authorities are to the effect that any payment or act ordered to be done will be presumed to be in full and final settlement of the controversy or subject-matter of the submission. Such is, at present, the recognized law in England. Russell says it is "not now necessary, whatever it may have been, that an award should express that a sum awarded to be paid, or an act to be done in favor of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms; a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act."<sup>2</sup>

A cause was referred. The arbitrator in his award ordered the defendant to pay the plaintiff a certain sum, without specifying for what it was to be paid, or ordering any manner of acquittance to be executed in return for it. But the court held that it was a presumption that the payment was to be in respect of the claim made in the cause. The matters in difference in the cause only were referred; "and to hold that the arbitrator awarded this sum of money, not in respect of the matters in difference in the cause, but in respect of some matter in regard to which he had no right to award, would be to make an intendment for the express purpose of defeating the award."<sup>3</sup>

The rule as laid down in several courts in the United States is, that an award is not bad for want of mutuality simply because it does not order that a release be executed, or does not itself contain words of satisfaction superseding the necessity of the release. If the controversy or demand is finally disposed of, so that the same claim cannot again be made the subject

<sup>1</sup> Russell on Arb., 3d ed. p. 285 *et seq.*; Bac. Abr. Arb., E. 3; *Stains v. Wild*, Cro. Jac. 352; *Nichols v. Grunnion*, Hob. 49; *Horton v. Benson*, Freem. 204; Rolle's Abr. Arb., K. p. 253; *Aylard v. Nicholls*, Freem. 265; *Ormelade v. Coke*, Cro. Jac. 354; *Veale v. Warner*, 1 Saund. 327, n. 2.

<sup>2</sup> Russell on Arb., 3d ed. p. 286; *Thomlinson v. Arriskin*, Com. Rep. 328; *Cooper v. Hirst*, 1 Lutw. 539; *Veale v. Warner*, 1 Saund. 327, n. 2.

<sup>3</sup> *Hobson v. Stewart*, 4 Dowl. & Low. 589.

of a suit at law, it is sufficient. "Mutuality is nothing more than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made, against the others, for the causes submitted, or, in other words, that it shall be final."<sup>1</sup>

**Award ordering Releases is mutual.**—Though releases be not necessary, yet if they be ordered the matter of mutuality is put beyond a question. Thus in an old New York case it was said that if an award puts a final end to the controversy, and directs mutual releases to be executed and exchanged, it is, of course, mutual. Nor does it make any difference that the one party is to perform and execute the acts required of him before the other party is to execute the general release.<sup>2</sup>

**Award of Payment to One only of Two Joint Creditors.**—The doctrine is asserted in Vermont that generally, where a single claim is submitted and the arbitrator finds a sum due upon it, an award of payment is sufficiently mutual and final. For the award becomes the legal evidence of the debt, and when the debt is paid the debtor's obligation and discharge will both rest upon the award. But in the present case the debt found by the award to be due from the defendant, R., to the plaintiff, O., was not due to O. alone, but to him and one W., who was not a party to the submission. "And though payment of that debt to O., in pursuance of the award, would operate to discharge R., yet his discharge would not rest upon the award, but upon the prior and continuing right of O., as one of the joint creditors, to receive payment of the debt for himself and W. Thus it would seem that no protection or benefit whatever could result to R. from the submission or award;" and the award was declared not to be mutual.<sup>3</sup>

**Force of the word "For" in an Award of Payment.**—If an

<sup>1</sup> Purdy v. Delavan, 1 Caines, 304; Karthaus v. Ferrer, 1 Pet. 222; Cox v. Jagger, 2 Cow. 638; Spofford v. Spofford, 10 N. H. 254. See statement of last two cases in Chapter IX., in the paragraphs, Award need not order Release.

<sup>2</sup> Munro v. Alaire, 2 Caines, 320.

<sup>3</sup> Onion v. Robinson, 15 Vt. 510.

award direct a sum of money to be paid "for" any thing, it has always been regarded as sufficiently mutual and final. The word "for" clearly implies that for which the payment is to be in satisfaction, and the payer is benefited by the discharge of his liability.<sup>1</sup>

An award that all suits shall cease has been held to be mutual, inasmuch as it has the effect of a release; and the submission and award may be pleaded in discharge as well as the release.<sup>2</sup>

But where "all matters in controversy" were submitted by rule of court, and the award was only that a certain sum should be paid by one party to the other; Holt, C. J., refused to grant an attachment before the payee should tender a release, though he did not set the award aside.<sup>3</sup>

**Award under a Submission by an Agent.**— If a person undertakes to enter into a submission on behalf of another for whom he has no authority to submit, and who is therefore not bound by either the agreement or award, the submission will not be mutual, and, as a necessary result, the award also will be neither mutual nor final; and it will be too late, after the award is made, for the party in whose favor it is made to rectify the submission, if he was not bound by it at the time of the hearing and making the award. For example, where overseers of the poor undertook to submit the claim of a pauper, they having no legal authority so to do, the award was held void in a suit brought upon it by the pauper herself.<sup>4</sup> But this ruling must be understood to be confined to the relationship of the supposed principal and the party of the other part, as between them the award will not be mutual. But the agent who actually enters into the submission may have be-

<sup>1</sup> Russell on Arb., 3d ed. p. 286; *Hopper v. Hackett*, 1 Lev. 132; *Hawkins v. Colclough*, 1 Burr. 275; *Baspoole v. Freeman*, Cro. Jac. 285; 8 Rep. 97 b; *Elliot v. Chevall*, 1 Lutw. 541.

<sup>2</sup> *Strangford v. Green*, 3 Mod. 228; *Harris v. Knipe*, 1 Lev. 58.

<sup>3</sup> ——— *v. Palmer*, 12 Mod. 234.

<sup>4</sup> *Furbish v. Hall*, 8 Maine, (Greenl.) 315.



come personally bound by it and by the award, and the award may be mutual and valid as between him and the party of the other part.<sup>1</sup>

Disputes existing between A. and B., a submission was entered into by A. with C., as attorney for B. The award was that C. should pay to A. a certain sum of money, and that C. and A. should execute mutual releases; but the release of A. to C. was ordered to run *to the use of C.* The award was held bad for want of mutuality, inasmuch as nothing was awarded for the benefit of B.; if the release to be executed by A. had run to B., or even to C. generally, the award might have been upheld; for in the latter shape the release would have been intended to be for B.'s use, since the submission had been professedly entered into by C. on B.'s behalf.<sup>2</sup>

If a Party is not bound by the Award, it is not mutual. — It has until recently been a tendency of the English courts to hold that if an infant or a *feme covert* were a party to a submission, the submission, and consequently also the award, were void for want of mutuality. For neither an infant nor a *feme covert* could be thus bound.<sup>3</sup> But the principle is now gaining ground that if a person enters into a submission with a party thus incapacitated, and knowing the fact, he at least shall be held bound by his own voluntary act and its consequences, though the incapacitated person may not be.<sup>4</sup>

**Force of a Stipulation concerning Releases, contained in the Submission.** — Under a submission to determine a disputed boundary line, embodying an agreement to execute such releases as the arbitrators see fit to direct, it is not essential to

<sup>1</sup> *Buchanan v. Curry*, 19 Johns. 137.

<sup>2</sup> *Bacon v. Dubarry*, 1 Ld. Raym. 246; and see, to the same effect, *Cayhill v. Fitzgerald*, 1 Wils. 28, 58.

<sup>3</sup> *Cavendish v. —*, 1 Ca. in Chy. 279; *Biddell v. Dowse*, 6 Barn. & Cr. 255. To the same effect is the case of *Furbish v. Hall*, 8 Maine, 315, stated at length, *supra*, p. 380.

<sup>4</sup> *In re Warner*, 2 Dowl. & Low. 148; *Wrightson v. Bywater*, 3 Mee. & W. 199; *Jones v. Powell*, 6 Dowl. 483; and see *Russell on Arb.*, 3d ed. pp. 17, 287, 288; *Palmer v. Davis*, 28 N. Y. 242, and *ante*, p. 28.

the validity of the award, in the particular of mutuality, that releases should be required on both sides. If the title is so ascertained by the award itself as to leave no room for doubt or dispute, and a release be awarded, to be executed by one party only, it will not be bad for want of mutuality, because no release is required from the other party. Thus where A. was in possession of the land over which the line was run, and was directed to release to B. all the land up to that line, it was held that it was no objection to the award, that it did not direct B. to execute to A. a release of the land lying on the other side of the line, since A. was already in possession and claiming title.<sup>1</sup>

Power conferred in the submission to order mutual releases is satisfactorily exercised by ordering several releases, where the party of the one part is composed of several individuals.<sup>2</sup>

**An Award neglecting to order a Conveyance of Real Estate.**—An award directed a son to take the real estate of his deceased father, and to pay certain sums to the other heirs. It was held to be bad for want of mutuality. For though an award concerning real estate can operate by way of estoppel, yet it does not actually pass and vest title; consequently the son was bidden to pay for property, the legal title to which was nevertheless not placed in him.<sup>3</sup> But if the title is already vested in the party in whose favor the award is, of course no conveyance is required.<sup>4</sup>

**Awards may be mutual by Implication.**—An award concerning a disputed title to oxen declared that one party should pay to the others a certain sum. Held, that the failure specifically to state that the payer should have the oxen as his property did not avoid the award for want of mutuality, since this

<sup>1</sup> Jones v. Boston Mill Corporation, 6 Pick. 148.

<sup>2</sup> Smith v. Demarests, 3 Halst. 195.

<sup>3</sup> Miller v. Moore, 7 Serg. & R. 164.

<sup>4</sup> Jones v. Boston Mill Corporation, 6 Pick. 148.

disposition of the ownership was "certainly to be inferred" from the order to pay.<sup>1</sup>

An award that one party should "keep and enjoy the goods, paying" a certain sum to the other, was objected to on the ground that there was no positive direction that the money should be paid. But it was held to be good, as sufficiently implying an order for payment.<sup>2</sup>

But where an award was that certain work done was worth a certain sum, for which the creditor should accept a bill of sale of part of a ship, it was held that the award was bad because it did not order the debtor to give such bill of sale, and the defect could not be supplied by implication.<sup>3</sup>

**Order that a Party pay a Debt to a Stranger.** — An award that one party to the submission shall pay a debt to a third person who is a stranger to the submission, for which debt both parties are alike bound, is valid as between the parties. It makes no difference that the stranger is not affected in his right to sue either of them at his option. This rule frequently comes into play in the settlement of partnership matters, where one partner is ordered to pay the partnership debts, but the creditors are of course not obliged thereafter to look only to him.<sup>4</sup>

<sup>1</sup> *Hanson v. Webber*, 40 Maine, 194.

<sup>2</sup> *Stiles v. Triste*, 1 Sid. 54.

<sup>3</sup> *Clapcott v. Davy*, 1 Ld. Raym. 611.

<sup>4</sup> *Lamphire v. Cowan*, 39 Vt. 420.

## CHAPTER XIV.

### THE AWARD MUST BE FINAL.

Nature of the requisition of finality.

Award should put an end to litigation.

Only litigation between the parties need be prevented.

Award operating for only a limited time.

Award leaving an act of a judicial nature to be done in the future.

1. Reservation of further judicial duty or authority to the arbitrator.

2. Reservation of further judicial duty or authority to a stranger.

3. Reserving a judicial power to a party.

The functions of a valuer are judicial.

The void order may be eliminated, and the rest of the award stand.

Award reserving a ministerial duty or authority.

Directions for deductions and calculations.

Directions for taxation of costs.

Directions for the calculation of interest.

Directions for correction of errors.

Directions for the execution of deeds, releases, &c.

The ruling in a peculiar case.

Award upon condition that an act be done by a party.

Award conditioned to be void upon the happening of an event.

Entry of judgment on a conditional award.

Referring questions of law to the court by means of a condition.

Award conditioned on the arbitrator's authority.

Award in the alternative.

Impossibility in one of the alternatives.

Uncertainty in one of the alternatives.

Method of availing of want of finality.

**Nature of the Requisition of Finality.**— It is one of the cardinal rules in the law concerning arbitration that the award must be final; that is to say, it must constitute a complete and final disposition and determination of the matter submitted. The very sweeping character and operation of this rule will become obvious upon a moment's reflection. Without stretching the phrase beyond its ordinary meaning, the requisition of finality may be made to include a large proportion of all the characteristics essential to a valid award. Thus an award which is

not certain, is not final; for where there is doubt there can be no finality. An award which is not consistent is not final. An award which does not dispose of all the matters which the arbitrators are under obligation to dispose of, or which, in other words, is not co-extensive with the submission, is evidently not final. An award which neglects to give directions which are indispensable to the fulfilment of its decision is not final. As, for example, it is a rule that an award concerning the title to real estate is not sufficient by itself to pass the title to the land, but a subsequent conveyance must be made by the party in whom the legal title is outstanding. Consequently if an award finds that the title is in a person other than him in whose name it legally stands, or if an award makes a partition of lands held in common,<sup>1</sup> or runs a disputed boundary line, and does not order conveyances, it may be bad for want of finality. This inclusion of other traits in the grand trait of finality will be noticed in the language of many of the decisions. Often a defect will be displayed and the courts will say, as though the phrases were interchangeable, that by reason of it the award is neither certain nor final, or that it is not final and does not dispose of the matters which the arbitrators were bound to dispose of.<sup>2</sup> In this chapter, it has been deemed best to bring together only such matters and causes arising under the rule requiring finality as could not easily or naturally be classed under any other distinct head.

**Award should put an End to Litigation.** — An award, in order to be really final, ought so thoroughly to determine and dispose of the controversies submitted, that they cannot become the basis of future litigation.<sup>3</sup> But this rule must be con-

<sup>1</sup> *Johnson v. Wilson*, Willes, 248.

<sup>2</sup> A great many cases, which might seem to many persons to have fallen naturally and appropriately into this chapter, will be found in Chapter XI., entitled "The Award must be Co-extensive with the Submission," where they appeared to me to find a fitting place; though the selection is not easily determined upon, and would probably be differently made by different people.

<sup>3</sup> *Waite v. Barry*, 12 Wend. 377.

strued reasonably. It is only the precise question submitted which can or ought to be thus laid for ever at rest. Collateral or cognate doubts growing out of the same subject-matter, but not falling within the actual scope of the arbitrator's authority, neither can nor ought to be decided. And of course it is impossible that the institution of future litigation should be rendered an impossibility. A person may begin a suit upon a claim which has been finally settled by an award, and the rule of finality will be satisfied if the award can operate as a perfect bar to the prosecution of the suit. So the award may become the subject of litigation, either in proceedings to enforce it or to set it aside. But in such an event, it is the award itself that constitutes the independent subject-matter of the legal proceedings, and not the matters decided in the award.

An award has been said to be final when "nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it without any further ascertainment of rights and duties."<sup>1</sup>

An award directing A. to pay to B. (both being parties to the submission) a sum named, on the ground that it was the value of certain shares belonging to B. in the stock of a corporation all the property of which had been converted by A. to his own use, and not directing a transfer of the shares to A., is bad for want of finality.<sup>2</sup>

Under a submission to an arbitrator to settle the affairs of a partnership, an award not directing the partnership to be dissolved nor stating an account between each partner and the firm, but simply ordering one partner to pay a sum of money to the others, was held void for want of finality.<sup>3</sup>

**Only Litigation between the Parties need be prevented.** — Ob-

<sup>1</sup> *Colcord v. Fletcher*, 50 Maine, 398.

<sup>2</sup> *In re Williams*, 4 Denio, 194.

<sup>3</sup> *Paine v. Paine*, 15 Gray, 299.

viously the prevention of future litigation can be effected only as between the parties themselves. If the matter be settled so that neither party retains a cause of action against the other upon the submitted claim, it is all that the arbitrators can do in the premises. They cannot affect or bind the rights of strangers to the submission, or determine any matter so finally that a stranger cannot exercise any right of litigation which may happen to reside in him before or after the arbitration takes place. This is well illustrated by cases arising out of partnership disputes; as, for example, the following:—

All matters in difference between partners were submitted. It was held that an award, settling the partnership, dividing its assets and liabilities as between the parties, and establishing their rights and duties as towards each other, was sufficiently final. For an award was competent to do no more. And though litigation might spring up on account of these common rights and duties in respect to third persons, yet this liability could by no possibility be removed by any finding or order which it was in the power of the arbitrators to make. “They could not appoint a receiver of the partnership. They reached the limit of their powers when they settled the rights of the parties as between themselves.”<sup>1</sup>

**Award operating for only a Limited Time.**—An award ought to be good for all time, or at least for so long a time as the subject-matter of the submission can survive. If the arbitrators, being called upon to make a general disposition of a controversy, give orders which dispose of it only for a limited time, at the close of which it may again spring into life, their award will obviously not be final.

A submission was entered into between a land-owner and a mill-owner, to determine the damages to be paid by the latter to the former for flowing his land. The award was of a certain annual payment, to be made so long as the mill-owner should keep up the dam, with “the understanding and agree-

<sup>1</sup> *Lamphire v. Cowan*, 39 Vt. 420.

ment" that if he should discontinue it the land-owner should "be entitled to such damages as it appears his lands sustain in consequence of former flowing, until they arrive at their primitive goodness." Held, that the award was neither certain nor final; for that the matter submitted was left open to a future controversy, on the contingency of the discontinuance of the dam.<sup>1</sup>

**Award leaving an Act of a Judicial Nature to be done in the Future.** — An award will be bad for want of finality if it leaves any act of a judicial nature to be done in the future. It is matter of indifference whether such act is to be done by a party to the submission, by a stranger, or even by the arbitrators themselves. The award must, as a decision, be complete in every part and upon every point, and must be made in this perfect shape once for all.<sup>2</sup>

**1. Reservation of further Judicial Duty or Authority to the Arbitrator.** — An award in an old case ordered the defendant to leave on certain land so many trees, by way of house-bote and hedge-bote for the plaintiff, as the arbitrators, upon advice with counsel at the next assizes, should appoint. It was held void, as being imperfect and reserving a future authority to the arbitrators.<sup>3</sup>

An award ordered A. to pay to B. certain sums, by instalments, to execute a bond to B., and also a warrant of attorney to enter judgment on the bond to secure the payment; but further directed that the warrant should be given into the hands of the arbitrators, and that judgment should not be entered by virtue of it without their consent. The award was held bad, by reason of the reservation of further power to the arbitrators.<sup>4</sup>

An award ordered a party to cleanse, scour, and clear out a stream, and provided that if the other party should not be

<sup>1</sup> *Lincoln v. The Whittenton Mills*, 12 Metc. (Mass.) 31.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 269; *Winch v. Saunders*, 2 Rolle's Rep., 214, Cro. Jac. 584; *Palm*, 145; *Thorp v. Cole*, 2 Cr. Mee. & Ros. 367; 4 Dowl. 457; *Com. Dig. Arb.*, E. 16; *Selby v. Russell*, 12 Mod. 139; *Nott v. Long*, 9 G. II., B. R., cited in *Cayhill v. Fitzgerald*, 1 Wils. 28.

<sup>3</sup> *Thinne v. Rigby*, Cro. Jac. 314.

<sup>4</sup> *Lindsay v. Lindsay*, 11 Irish C. L. Rep. 311.



satisfied that this had been properly done, there should be a further hearing upon this point before the arbitrator. Held, that this reservation of further authority was bad.<sup>1</sup>

An award ordered a defendant to pay a certain sum to the plaintiffs. But it provided, that in case it should afterwards appear to the arbitrators that the plaintiffs had not discharged the defendant from certain debts in which he was bound for them, then so much of the sum aforesaid should be repaid by them to him, as to the arbitrators should seem due. The award was held to be bad by reason of the retention of future judicial power by the arbitrators.<sup>2</sup>

**Directions for Taxation of Costs.**—The direction that costs shall be taxed is proper. For the taxation, made by the officer of the court, is regarded as a ministerial not as a judicial act. The items are controlled by a fixed tariff, and the clerk exercises no discretion in the matter.<sup>3</sup> But, of course, if the taxation be directed to be made by one not officially entitled to tax costs, the reason of the rule fails and the rule falls with it.<sup>4</sup>

**Directions for Deductions and Calculations.**—It is not absolutely necessary that the award should state in figures the exact amount to be paid. It is sufficient if there is such reference in the award to documents or other matters, that nothing remains but mere arithmetical computation, to render the award final and conclusive.<sup>5</sup>

In a controversy concerning a prize drawn in a lottery, the arbitrators awarded that the one party should pay to the other a certain sum "after deducting the usual percentage and the

<sup>1</sup> *Manser v. Heaver*, 3 Barn. & Ad. 295.

<sup>2</sup> *Winch v. Saunders*, 2 Rolle's Rep. 214; *Palm*. 145.

<sup>3</sup> *Russell on Arb.*, 3d ed. pp. 272, 273; *Knott v. Long*, 2 Strange, 1025; *Selby v. Russell*, 12 Mod. 139; *Lingood v. Eade*, 2 Atk. 501; *Pedley v. Goddard*, 7 Term, 73; *Worrel v. Atworth*, Sid. 358; *Cargey v. Aitcheson*, 2 Barn. & Cr. 170; *Hanson v. Liversedge*, 2 Vent. 242; *Holdsworth v. Borsham*, 31 L. J. Q. B. 145, and same case under name of *Holdsworth v. Wilson*, in 32 L. J. Q. B. See also the chapter on "Certainty," where several cases to the same effect are collected.

<sup>4</sup> *Russell on Arb.*, Part II., Chap. V., § 4, X.

<sup>5</sup> *Colcord v. Fletcher*, 50 Maine, 398; stated in the chapter on Certainty.

amount then already paid." The court said, that it was not indispensable that the award should state in words or figures the precise amount to be paid. If nothing remained to be done, to render the decision certain and final, but a mere ministerial act or an arithmetical calculation, it would be good. As, for example, in this case the amount of percentage which was directed to be deducted was fixed by law, and so far as this went the award was certain and final enough. But since no means were furnished of ascertaining what amount had been already paid, and this, if disputed, would necessarily become the source of further litigation; therefore, the award was not in this respect final, and was void.<sup>1</sup>

In the chapter on the Formalities and Contents of the Award,<sup>2</sup> it has been already stated that an award may be made upon several items distinctly, leaving the calculation to be done afterward, upon an adjustment of the controversy in pursuance of the award.

Judge Cushing, in a well-considered opinion, says, "when it is laid down as a principle of law that an award should be final, the meaning is, not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty." The division in this case was to be of certain chattels, the property of a partnership, and the judge, in applying the above view of the law, said, "It is true the arbitrators do not themselves actually sever the things to be divided, whether hay, grain, utensils, or logs. There is nothing in the submission which requires them to effect such actual severance and manual distribution of these things. They adjudge and award that the things shall be divided, and they decide in what proportions. In many cases no more is possible to be done; as of an award for the division of partnership effects, which may

<sup>1</sup> *Waite v. Barry*, 12 Wend. 377. To the same effect is *Fletcher v. Webster*, fully stated in the chapter entitled "The Award must be Certain."

<sup>2</sup> Chap. IX., *ante*, p. 265; *Kendrick v. Tarbell*, 26 Vt. 416.

happen at the time to be abroad, or otherwise not in the personal possession of either party, and of which the quantity or value is not known ; or, as in the case of an award concerning objects not in their nature presently divisible, but hereafter susceptible of division, such as the yet immature crop of a fruit-tree ; or, as in the case of joint interests not in their nature capable at any time of a material severance, like the property in a ship. All these, and many other examples which readily suggest themselves, would seem to show that an award, which purports to divide property between two persons, by prescribing a rule of division, may well be final, though the property in question be not actually divided, nay, though it be incapable of division. If the award give a definite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application. Though possible doubt may attach to the doctrine by reason of *dicta* in some late English cases, yet on the whole it is admitted in those very cases, that if the arbitrator makes ‘some regulations upon the matters of difference,’ to use the words of Baron Parke, or ‘gives direction’ as to what is to be done, according to the language of Lord Abinger, it is decisive in favor of the award.”<sup>1</sup>

**Award reserving a Ministerial Duty or Authority.** — An important distinction is taken by the courts between acts of a judicial and those of a ministerial nature. The latter may properly be ordered by the award to be done in the future by a third person, or the power to do them may be reserved by the arbitrator to himself. Neither is it essential that these acts should be completed within the time limited for the making of the award.<sup>2</sup> If the duty of the arbitrator is to value certain real estate, he may declare in his award at what rate it shall be

<sup>1</sup> Strong v. Strong, 9 Cush. 560.

<sup>2</sup> Russell on Arb., 3d ed. p. 272 ; Winch v. Saunders, 2 Rolle's Rep., 214 ; Palm. 145 ; Cro. Jac. 584 ; Thorp v. Cole, 2 Cr. Mee. & Ros. 367 ; 4 Dowl. 457 ; Owen v. Boerum, 23 Barb. 187.

estimated per acre, and order that the number of acres be ascertained by measurement ; for measuring the area of a field is a purely ministerial act.<sup>1</sup>

**The Void Order may be eliminated and the Rest of the Award stand.**—The principle of divisibility in the award may sometimes come in to save it from being rendered entirely void by reason of an illegal reservation of a further judicial duty or authority. If the clause containing this reservation can be separated from the residue of the award, according to the principles laid down in Chapter XVII., the elimination will be performed and the residue of the decision will be upheld. An arbitrator, whose authority was to decide concerning the use of a stream, decided this matter, and proceeded further to order that certain cleansing, scouring, &c., should be done by the defendant. Under the apprehension that future differences might arise respecting the performance of these acts, he reserved to himself power in such an event to determine such differences, and to make a final award. But at the same time he stated that his present award was final unless the plaintiff complained within the space of two months. The court held that his reservation to himself of further authority was void ; but since the rest of the award contained a final decision on the subject-matter of the submission, it was held good *pro tanto*, and only the bad portion was rejected.<sup>2</sup> Russell, in commenting on the case, points out the important fact that the reservation was of an authority over something not included in the submission, and not within the scope of the arbitrator's power ; so that the entire clause regarding the erection of the works was simply an excess of authority.<sup>3</sup>

**The Functions of a Valuer are judicial.**—The functions of a

<sup>1</sup> Ibid. ; *Hunter v. Bennison*, Hard. 43.

<sup>2</sup> *Manser v. Heaver*, 3 Barn. & Ad. 295 ; *Goddard v. Mansfield*, 19 L. J. Q. B. 305 ; and see *Barton v. Ranson*, 3 Mee. & W. 322. See *Tomlin v. Mayor of Fordwich*, 5 Ad. & El. 147, in which separation was refused, and the judges expressed much dislike of the doctrine.

<sup>3</sup> Russell on Arb., 3d ed. p. 270.

valuer are regarded as judicial. Whence doubtless it would follow that directions in an award for a future valuation to be made would be void. So says Russell; but the authorities which he cites do not go the full length of establishing the principle.<sup>1</sup>

A somewhat singular award was to the effect that A. should pay to B. £50, and should beg B.'s pardon in such manner and place as B. should appoint. The latter order was held to be void, as making B. a judge in his own cause upon points which ought to have been determined by the arbitrator. For though time and place be but incidents or circumstances, yet in such a matter they constitute the most considerable part of the act.<sup>2</sup>

An award which requires A. to give bonds to B., with such sureties as B. shall approve, is bad, because it commits the judicial act of approval to B.<sup>3</sup>

**2. Reservation of further Judicial Duty or Authority to a Stranger.**—If the arbitrators award that the disputants shall abide by the award of a third person to be named by the arbitrators, the direction will be doubly void, not only for want of finality, but also as being an illegal delegation of their judicial authority in the premises.<sup>4</sup> So an order that one party shall account before such auditors as the other party shall assign, and, if he be found in arrears, shall pay the amount, is altogether void.<sup>5</sup>

If on a submission to settle the terms and conditions of a lease, the arbitrators direct that the premises be put into repair to the satisfaction of a person named in the award; or if, after determining the head of water a miller might keep, they

<sup>1</sup> Russell on Arb., 3d ed. p. 273, citing *Anderson v. Wallace*, 3 Cl. & Fin. 26; *Cockson v. Ogle*, 1 Lutw. 550; in which latter case, however, the court were not obliged to decide the point, and Powell, J., expressed a different opinion from that of his associates.

<sup>2</sup> *Glover v. Barrie*, 1 Salk. 71.

<sup>3</sup> Com. Dig. Arb., E. 15; see *post*, in this chapter, the statement of the case of *Simmonds v. Swaine*, 1 Taunt. 548.

<sup>4</sup> Russell on Arb., 3d ed. p. 270; *Lower v. Lower*, Rolle's Abr. Arb., E. 20, and H. 11.

<sup>5</sup> Rolle's Abr. Arb., I. 9.

order the miller to put up such durable marks for denoting the height of water as a surveyor, named, should direct; the award containing such order and directions will be void, for the double reason above stated.<sup>1</sup>

**3. Reserving a Judicial Power to a Party.**—Nothing more irregular than the reservation of any manner of judicial power to a party can well be conceived, yet instances have occurred of its being done. Thus, an award ordered that the defendant should pay to the plaintiff a certain sum, unless within a certain time the defendant should exonerate himself by affidavit from certain payments and receipts, in which case a less sum was directed to be paid. Lord Kenyon held the award bad because a sum in dispute was left to be decided “by the person who of all others was least qualified to decide” it, namely, by the very party by whom it must be paid, if it were to be paid at all.<sup>2</sup>

**Directions for the Calculation of Interest.**—It seems that if interest is ordered to be estimated, it will be proper for the arbitrator to lay down the rules by which the calculation is to be made. For there are different rules by which interest may be figured and which may lead to materially different results. Yet, upon the other hand, if nothing be said as to the method, it is the fair and rational presumption that the modes recognized in the courts of justice in the country where the contract was made, were intended to be followed.<sup>3</sup>

In Massachusetts, it was objected to an award that instead of ordering payment of a fixed sum, it directed the payment of a certain sum at a certain time, *with interest*. The court said: “Here is no uncertainty. The law fixes the rate of interest. When, therefore, the sum is fixed, and the time of payment, the computation of interest being to be made by a

<sup>1</sup> Johnson *v.* Latham, 19 L. J. Q. B. 329; Tomlin *v.* Mayor of Fordwich, 5 Ad. & El. 147.

<sup>2</sup> Pedley *v.* Goddard, 7 Term, 73; and see Rous *v.* Lun, 1 Keb. 569.

<sup>3</sup> M’Kinstry *v.* Solomons, 2 Johns. 57; 13 *id.* 27; and see the chapter on Certainty, where other cases to the same effect are collected.

fixed rule, the result is as certain as if the computation had been made and the result stated by the arbitrators in dollars and cents.”<sup>1</sup>

**Directions for Correction of Errors.**— A direction in the award that any error in addition, or in the calculation of interest, which may have occurred in the making up of the account, shall be deducted or refunded, does not invalidate the award for want of finality.<sup>2</sup>

Submission was made to arbitrators to determine the price of an estate. In their award, they named the sum to be paid and the number of acres which the estate was estimated to contain, and added that in case any error should be detected in the measurement, then an allowance at a certain rate per acre should be made, either by way of addition or deduction according as the measurement acted upon should be found to be less or more than the correct measurement. A certain rate per acre was named in case the difference should prove to be on one side of a brook; double that rate was to be allowed if the difference should be on the other side of the brook. The award was declared to be neither final nor certain, since it failed to state how much land the arbitrators conceived to lie upon either side of the brook; consequently all the necessary data for determining on which side of the brook the difference was were not given. But it was added that if the addition or deduction had been ordered to be made at an uniform rate per acre as to all the land, this difficulty would have been removed, and the award would have been good, on the principle that “*id certum est quod certum reddi potest.*”<sup>3</sup>

**Directions for the Execution of Deeds, Releases, &c.**— Directions that a party shall execute a deed, release, or other legal instrument are of frequent occurrence in awards. The degree

<sup>1</sup> Skeels v. Chickering, 7 Metc. (Mass.) 316.

<sup>2</sup> M’Kinstry v. Solomons, 2 Johns. 57; s. c. 13 id. 27; but as to the calculation of interest, see *ante*, p. 394.

<sup>3</sup> Hopcraft v. Hickman, 2 Sim. & St. 130.

of accuracy with which the nature and contents of the document must be described has already been under discussion. Russell says that "such a direction will sometimes avoid the award, sometimes not, according as in each case it is treated as a reservation of a judicial or ministerial duty."<sup>1</sup> There seems to be no question that if the order is simply that a deed, release, or other instrument be executed and delivered, the task of drawing the document will be regarded as simply ministerial. The difficulty arises where the drafting is directed to be done to the satisfaction, or by the advice, of some person; for this reservation of an advisory or judicial power is contrary to the established principle.

If the reservation be to the arbitrator, it is generally construed to be judicial.<sup>2</sup> For example, an award that the defendant shall pay the plaintiff a sum certain, and shall execute such a bond, to secure the payment, as the arbitrators shall advise, has been held to be bad.<sup>3</sup> So an award that the defendant shall secure payment of a sum to the plaintiff in such manner as the arbitrators shall advise, is invalid.<sup>4</sup>

Submission was made concerning the right to certain real estate. The award ordered certain parties to execute to another party all such conveyances, releases, and assurances as might be necessary to pass their respective interests to him, but it reserved to the arbitrators, in case of dispute as to the manner in which the conveyance should be effected, a power to appoint a counsel or solicitor to decide as to what should be the proper conveyances, releases, or assurances, and what clauses, provisions, and covenants these instruments should contain. The award was held to be wholly void. Coleridge, J., said: "It is settled that if an arbitrator does not decide the matter referred to him, at the time he makes his award,

<sup>1</sup> Russell on Arb., 3d ed. p. 273.

<sup>2</sup> Ibid.

<sup>3</sup> Rolle's Abr. Arb., H. 4, p. 250.

<sup>4</sup> 19 Edw. IV., 1, cited in *Hunter v. Bennison*, Hardw. 43.



but reserves to himself a future power to act when his power is gone, that it is an excess of authority, as he cannot in that way keep alive his authority ; nor can he, I think, delegate it, as he attempts to do here.”<sup>1</sup>

But it has been held that if arbitrators, on a reference out of chancery, leave it to the court, if it shall see fit, to give instructions to the master to settle the form, the award will not therefor be bad.<sup>2</sup>

Where the reservation of power to advise or pass upon the sufficiency of the instrument is made to any other person than the arbitrator, the cases are somewhat contradictory. An order for the execution of such a bond of security, or of such releases, as a stranger shall advise, has been held to be bad.<sup>3</sup> But an award that one shall release to another, by the advice of J. S., has been held good.<sup>4</sup>

If the direction be that one party shall execute to the other, such a bond of security as his opponent's counsel shall advise, or a general release, as fully and beneficially as counsel shall advise, the award may be good. For it is said that the delegation to the counsel enables him to perform only a ministerial act. The arbitrators have determined the extent of the bond and release ; the counsel has no judicial authority as to the character of the instruments, but his sole duty and function is to make them as strong in law as he can.<sup>5</sup> In like manner where an arbitrator awarded that, for the purpose of deciding the title to certain land, an action should be conceived by the advice of certain designated counsel, this was held to be a reference to the judgment of the counsel upon the matter of form merely, not of substance.<sup>6</sup>

<sup>1</sup> *In re Tandy & Tandy*, 9 Dowl. 1044.

<sup>2</sup> *Lingood v. Eade*, 2 Atk. 501.

<sup>3</sup> *Rolle's Abr. Arb.*, H. 6, p. 250 ; *Emery v. Emery*, Cro. Eliz. 726.

<sup>4</sup> *Anon.*, Jenk. 3d cent. case 61, p. 129.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 274 ; *Cater v. Startut*, *Rolle's Abr. Arb.*, H. 7, p. 250 ; *Sty.* 217 ; *Jenk.* 129.

<sup>6</sup> *Brooke's Abr. Arb.*, 37.

In Massachusetts, an award ordered that the defendants should have and hold certain land, upon condition that within six months they should execute a deed of release to the plaintiff, sufficient in the opinion of the supreme judicial court, or of the attorney-general, to bar them from any future claims to certain lands and to confirm the same lands to the plaintiff. The condition was held by the court to be good and operative in every particular.<sup>1</sup>

**The Ruling in a Peculiar Case.**—An award stating that A. has a just claim for the sum awarded and for “even more, if insisted on,” implies that the claim for more was waived before the arbitrator. Payment of the sum awarded is a discharge of the debtor under the award, and the receipt of it is a waiver by the claimant of any further demand.<sup>2</sup>

**Award upon Condition that an Act be done by a Party.**—“An award,” says Russell, “leaving the result conditional on the voluntary performance by one party of some particular act for the benefit of the other, seems generally open to the objection of not being final.”<sup>3</sup>

“An award,” says Judge Wilde, “may be conditional. But if the condition be such as to give rise to a new controversy, then it will be bad.”<sup>4</sup>

An order that a party shall do an act upon the premises of a third person is good, provided it be conditioned upon the prior permission of the owner of the land; though otherwise it would be void, as directing a trespass.<sup>5</sup>

A lease of certain premises was awarded to a party, with the proviso that if the rent which he was directed to pay should not be paid, then the award as to his enjoyment of the lease should be void. The award was held good, for it became abso-

<sup>1</sup> *Commonwealth v. Pejepsut Proprietors*, 7 Mass. 399.

<sup>2</sup> *M'Kinstry v. Solomons*, 2 Johns. 57, and 13 id. 27.

<sup>3</sup> Russell on Arb., 3d ed. p. 266; *Crofts v. Harris*, Carth. 187. See the chapter on Mutuality.

<sup>4</sup> *Lincoln v. Whittenton Mills*, 12 Metc. (Mass.) 81.

<sup>5</sup> *Turner v. Swainston*, 1 Mee. & W. 572.

lute if the party paid the rent, and if he did not, he lost the benefit of enjoyment solely by his own default.<sup>1</sup>

An award was that the defendants should have and hold certain land in controversy upon condition that they should within six months from the date of the award execute a certain deed of release to the plaintiff. The validity of the condition was upheld in a very elaborate opinion delivered by Judge Sedgwick. He held that it was a condition precedent and that it must be performed by the defendants before they could set up any claim to the land by virtue of the award.<sup>2</sup> No fault was found on the ground of want of finality. On the contrary, the judge said that either arbitrators or referees might order any act to be done by a party "either absolutely or upon condition, as they might judge right."<sup>3</sup>

But it seems that if an option is left to a party as to which of two courses he will pursue, accordingly as he may regard one or the other as more beneficial to himself, the award will be void. The following English case is the best exemplification of a distinction which it is very difficult to put satisfactorily into abstract phraseology, yet which seems to be sufficiently obvious.

A shareholder in a joint-stock company sued the directors for the value of his shares at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the company's undertaking, and for other reasons. This action having been submitted, together with other matters, the arbitrators awarded in respect of it that the plaintiff was entitled to recover a certain sum from the company "upon his surrendering the fifty-two shares of stock held by him or transferring the same in favor of the said company, or of any person or persons they may direct for their behoof." In holding this order bad, Lord Brougham said: "The other point on which

<sup>1</sup> *Furser v. Prowd*, Cro. Jac. 423.

<sup>2</sup> See also *Lee v. Elkins*, 12 Mod. 585.

<sup>3</sup> *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 399.

I have no doubt in certain respects is, that the award is not final, and that it does not direct any thing specific or positive to be done, but merely that upon one party doing something, something is also to be done by the other party. If the plaintiff chooses to give up his shares, and divest himself of that property, the company shall pay him so much. It is in vain to argue that this direction was the same as a direction to a party to do so and so, upon another party producing letters of administration; or that it is like the case of a party who is directed to do so and so upon a discharge being executed to him. It is in vain to say, as has been ingeniously put in the argument at the bar, that it is the same as directing a cautioner to do so and so upon the assignment to him of the principal obligor's interest. It is in vain to say that any of the three cases so put is at all the same as; or at all like to the one in question in this award. There was no necessary connection between the arrangement which the arbitrator was in the course of directing and the plaintiff's divesting himself of his property in ceasing to be a shareholder. The award did not direct him to give up the shares; it only said, if he chooses to get out of the situation of shareholder, he can divest himself of the joint-stock property and assign over or give up the shares to the company, and the company shall do so and so. That is a perfectly different matter, and ought to be made the subject of a specific direction binding the plaintiff obligatorily, not binding the company, in the event of the plaintiff executing the directions of this award, whatever they might be. I have no doubt whatever upon that objection to the award."<sup>1</sup>

An order directed a party to pay a certain sum of money "upon proof" that the other party has discharged certain claims. The court did not feel called upon to pass in direct terms upon the validity and effect of this order, for under the circumstances of the case, they felt able either to reject it as

<sup>1</sup> *Baillie v. Edinburgh Oil Gas-Light Company*, 3 Cl. & Fin. 639; and see *Carnochan v. Christie*, 11 Wheat. 446.

surplusage, or to regard it as a mere repetition of a stipulation contained in the award. But it was clearly regarded as a faulty order, considered *per se*.<sup>1</sup>

**Award conditioned to be void on the Happening of an Event.** — An award conditioned to be void upon the happening of a certain event, will be bad, whether that event be within the control of the parties or either of them, or not. "For by adding the proviso, the arbitrator has prevented his decision being a certain and final termination of the matters in dispute."<sup>2</sup> An award was that one party should pay to the other a certain sum of money, and that the payee should give to the payer a release, provided, however, that if the one ordered to pay should be discharged of any arrears due to soldiers, by the passage of an act of indemnity, then the award should be void. The award was held to be bad for want of finality.<sup>3</sup> So, likewise, where an award provided that in case either party should be dissatisfied with it, and within a specified time should pay a small sum to the other, then the award should be void and the parties remitted to their original rights to proceed against each other, it was held to be not final and void.<sup>4</sup>

**Entry of Judgment on a Conditional Award.** — If an award or report which is returnable into court and upon which judgment is to be entered, be made conditional, it has been held in Massachusetts that it is within the power of the court to enter a conditional judgment, agreeable in every respect to the determination expressed in the award. It seems, however, that no execution will be allowed to issue on such judgment; but that an action may be brought on the judgment when the condition has been fulfilled; or perhaps an attachment may then be ordered to compel a performance of the report or award. If there be nothing on the record to prevent the issue of an execution, and the judgment creditors wrongfully take it out, a remedy

<sup>1</sup> *Miller v. De Burgh*, 4 Exch. 809.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 268.

<sup>3</sup> *Kinge v. Fines*, Sid. 59; *Vin. Abr. Arb.*, H. 18.

<sup>4</sup> *Sherry v. Richardson*, Pop. 15.

may be had by *audita querela*.<sup>1</sup> A later case takes the same ground, though with some slight appearance of reluctance, as though the earlier decisions were regarded as having gone rather far.<sup>2</sup>

**Referring Questions of Law to the Court by Means of a Condition.** — As has been elsewhere laid down, the arbitrator or referee, whose award or report is returnable into court, may decline to pass upon a question of law, and may save it for the determination of the court.<sup>3</sup>

An award in a pending cause finding the facts, and giving a certain direction, in case it is competent in law for the arbitrators so to direct, and leaving the question of this competency to the court, is good.<sup>4</sup>

A witness offered by one party in the proceedings before the arbitrators, was objected to by the other as being incompetent, but was allowed to testify. The arbitrators made their report, awarding a certain sum to the plaintiff "on condition that W. shall be adjudged by the justices of the Supreme Judicial Court to have been legally admitted to testify in the cause;" otherwise they gave the defendant his costs. The court recognized the condition as referring to them the question of W.'s competency, and being of opinion that he was incompetent, they held that the defendant was entitled to recover his costs, and judgment was rendered accordingly.<sup>5</sup>

An award stating facts and finding for a party in a certain sum, if the court should be of opinion that two certain depositions should have been admitted, in a certain less sum if one of these depositions should not have been admitted, and in a third less sum named if the other of the two depositions should not have been admitted, was upheld as final.<sup>6</sup>

<sup>1</sup> *Skillings v. Coolidge*, 14 Mass. 43; *Commonwealth v. Pejepsut Proprietors*, 7 id. 399.

<sup>2</sup> *Day v. Laffin*, 6 Metc. (Mass.) 280.

<sup>3</sup> *Brickhouse v. Hunter*, 4 Hen. & Munf. 363.

<sup>4</sup> *Waugh v. Mitchell*, 1 Dev. & Bat. Eq. 510.

<sup>5</sup> *Fuller v. Wheelock*, 10 Pick. 135.

<sup>6</sup> *Scott v. Van Sandau*, 6 Q. B. 237.

A cause and all matters in difference were referred to arbitration. The arbitrator, in his award, set out all the facts in the case, declared that the plaintiff had no cause of action against the defendant, and that he determined the action in favor of the defendant, gave directions as to costs, and then concluded as follows: "But if the court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favor of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of one shilling" and costs. The award was sustained, though by a divided court. Parke, Baron, said that the only question was of finality; that as the arbitrator "had come to a positive finding, and expressly declared his own opinion," the latter part of his award, in which reference was made to the court, might be rejected.<sup>1</sup>

**Award conditioned on the Arbitrator's Authority.**— Another English case, very like that last cited, is as follows: The submission authorized the arbitrator to set aside certain deeds and to direct what should be done. He awarded that certain specific deeds should be set aside, "if and so far as the same respectively are in force, and if and so far as I have jurisdiction to set the same aside; and if I have no power to set them or any of them aside, I declare that the rest of my award is yet to stand." The award was declared not to be final, inasmuch as the arbitrator had not determined whether or not he had power to set these deeds aside, a question which he was bound to decide, and to act and award accordingly.<sup>2</sup>

**Award in the Alternative.**— An award made in the shape of alternatives is not uncommon, and is considered to be "sufficiently certain and final."<sup>3</sup>

The English reports furnish several instances of awards of this description which have been sustained. Thus an award

<sup>1</sup> *Barton v. Ranson*, 3 Mee. & W. 322.

<sup>2</sup> *Nickels v. Hancock*, 7 De Gex, Macn. & Gor. 300.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 268.

directing payment of a certain sum upon a certain day, or in default of such payment, then of a certain larger sum upon another later day named, has been held good.<sup>1</sup> The increase in the amount was regarded as in the nature of a penalty for the non-payment, which the arbitrator had a right to impose. So an award ordering payment to be made in instalments upon certain days named, but that, upon a failure to pay the first instalment on the day nominated, then the whole sum should become immediately due, was held a good award.<sup>2</sup>

An award that a certain sum should be paid if a right of way should not be taken away, and a certain other sum if it should be taken away, was upheld.<sup>3</sup>

Certain oxen were sold by A. to B., but were claimed by C. The "whole controversy between the parties as to the ownership of said oxen, and how much shall be paid for the same, and by whom, and who shall be entitled to receive said amount," was submitted. The arbitrators awarded that B. should pay A. the sum of \$92.25; and, further, "that said A. should pay said C. the sum of \$50.00, with the privilege on the part of said A., if he shall so choose, to pay said C., in addition to said \$50.00, fifty dollars more, and to receive a transfer of the note said C. holds against L. of \$100.00. But if A. wishes to take the L. note of \$100.00 at \$50.00, he shall tender to said C. said \$50.00, or to S. for him, within six days." The court said, "The alternative mode of payment, which C. was entitled to make, if he chose, would have been the execution of the award, and would have put an end to the whole controversy. This mode was intended to give him a privilege, if he should so regard it; and, if he should not accept it, the award was operative against him for the absolute payment of \$92.25 to B., and of \$50.00 to C."<sup>4</sup>

<sup>1</sup> *Royston v. Rydall*, Rolle's Abr. Arb., H. 8, p. 250; Com. Dig. Arb., E. 15.

<sup>2</sup> *Knockill v. Witherell*, 2 Keb. 838.

<sup>3</sup> *Collet v. Podwell*, 2 Keb. 670.

<sup>4</sup> *Hanson v. Webber*, 40 Maine, 194.



**Impossibility in One of the Alternatives.**— It may sometimes happen that an award which is in form in the alternative may not be so in fact. Thus, of two alternative acts ordered to be done, one may be uncertain or impossible. In such case, if the other be certain and possible, the award will be sustained, and the latter act must be performed.<sup>1</sup>

Thus an order was that a party should either cause an entry of satisfaction to be made on the judgment-roll in a certain cause, or should pay to the other party a certain sum of money. In fact, no such cause was in existence. The award was held good as an award for the payment of the sum of money named.<sup>2</sup>

An award was that either a deed must be delivered or a sum of money must be paid. The deed was not in the possession or control of the party, and delivery by him was impossible. He was held to be obliged by the award to pay the money.<sup>3</sup>

**Uncertainty in One of the Alternatives.**— As an example of an uncertainty in one alternative we find the following case. An award was that the defendant should pay to the plaintiff one hundred pounds by a certain day, or should furnish two sureties to be bound with him to the plaintiff for the payment of the hundred pounds in instalments of twenty pounds *per annum*. It was held that the latter alternative was altogether void, without regard to whether or not the defendant was able to furnish sureties, but that the former alternative was good. The award was therefore sustained as an order for the payment of the hundred pounds on the day named.<sup>4</sup>

An award was that the defendant should pay £500, and that the same should be paid, or secured to be paid, within one week from the date of the award. Mansfield, C. J., said that at first he feared this came within the same class of cases as

<sup>1</sup> Russell on Arb., 3d ed. p. 269; *Simmonds v. Swaine*, 1 Taunt. 548.

<sup>2</sup> *Wharton v. King*, 2 Barn. & Ad. 528.

<sup>3</sup> *Lee v. Elkins*, 12 Mod. 585.

<sup>4</sup> *Oldfield v. Wilmer*, 1 Leon. 140, 304.

*Thynne v. Rigby*,<sup>1</sup> and that it was uncertain because it did not point out what security was to be given. But "who is to settle what the security shall be? Certainly the man to whom the sum is to be paid. The true meaning, therefore, is to say that it shall be paid within a week; for if the security offered should please the plaintiff, he would take it without any directions from the arbitrator. Though much weight is due to the authority of *Croke*, probably, if the case reported there were a new case, it would be decided otherwise," by reason of the more liberal construction now given to awards. *Heath, J.*, said, "If one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed."<sup>2</sup>

**Method of availing of Want of Finality.**—As matter of practice the existence of want of finality in an award may be availed of in defence or avoidance in the same manner as want of certainty, and the subject is discussed at the close of the chapter on Certainty.

<sup>1</sup> Stated, *ante*, p. 388.

<sup>2</sup> *Simmonds v. Swaine*, 1 Taunt. 549.

## CHAPTER XV.

### THE AWARD MUST BE CERTAIN.

Signification of the phrase "certainty."

A certain award will be enforceable.

A less degree of certainty is sometimes required.

Effect of the existence of uncertainty.

Cases illustrative of fatal uncertainty.

Certainty created by presumption.

The favorable presumption is strengthened if the award be *de et super præmissis*.

Evidence concerning the existence of a dispute.

Certainty by implication from an award of costs.

A case where implication was not allowed.

An order for the payment of costs is certain.

The award must order the payment of "costs" in terms, or by a clearly equivalent phrase.

Failure to name party to whom costs are to be paid.

Award referring to something extrinsic.

Certainty in awards ordering payments.

Awards leaving a calculation to be made.

Awards ordering a computation of interest.

Orders for payment at the "market price."

Certainty in the description of a debt.

Certainty in a general award.

Certainty as to the time of performing an act ordered.

Certainty as to place of payment.

Certainty as to persons.

Certainty in the description of real estate.

An award concerning the price of land.

Certainty in awards concerning boundary lines.

Certainty in an award in an action of trespass to real estate.

Orders concerning mortgages.

Awards ordering security.

Award concerning a cause.

Statute of Limitations.

Statement of results.

Duty of party to correct uncertainty.

Award ordering payments from assets.

How uncertainty may be availed of.

Explanation of uncertainty.

**Signification of the Phrase "Certainty."** — An essential characteristic of an award is certainty. It is not necessary that it should be written with such technical and critical nicety that subtle examinations and forced constructions cannot discover a doubt, or a deficiency, or a double meaning in any part of it. But it must have such a degree of fulness and precision that no reasonable doubt as to the meaning and intention of the arbitrator can be entertained by intelligent men acquainted with the subject-matter.

Russell says, "An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it upon the parties. Certainty to a common intent only is sufficient, for the award will be construed by no technical rules, but in a fair and liberal spirit, with a view to support it as far as a sensible and reasonable interpretation will allow." <sup>1</sup>

"Certainty," says Judge Kent, "must be judged of only according to a common intent, consistent with fair and probable presumption." <sup>2</sup>

"Technical precision and certainty," said Judge Cowen, "are never necessary in an award. If it be expressed in such language that plain men acquainted with the subject-matter can understand it, that is enough, no matter how short and elliptical." <sup>3</sup>

If an award is sufficiently certain to uphold a contract on the same subject it is good.<sup>4</sup> So also says Judge Redfield: "The degree of uncertainty, to avoid an award of arbitrators, should be such as would avoid any other contract; such

<sup>1</sup> Russell on Arb., 3d ed. p. 275; citing *Hawkins v. Colclough*, 1 Burr. 275.

<sup>2</sup> *Purdy v. Delavan*, 1 Caines, 304, at p. 315. So also *per* Livingston, J., in *Schuyler v. Van Der Veer*, 2 Caines, 235, at p. 238; and see *Jackson v. Ambler*, 14 Johns. 96.

<sup>3</sup> *Butler v. Mayor, &c.*, of New York, 1 Hill, 489.

<sup>4</sup> *Perkins v. Giles*, 53 Barb. 342, at p. 349.

as would leave the meaning of the arbitrators *wholly in doubt*.”<sup>1</sup>

**A Certain Award will be enforceable.** — An award must be so far certain as to be capable of enforcement. “It ought to appear,” said Chief Justice Kent, “from the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, what things the parties are ordered to do.”<sup>2</sup>

**A less Degree of Certainty is sometimes required.** — If the court has power to recommit the award, it has been intimated that it may be looked at with a somewhat more critical eye than in cases where this power does not exist. In the absence of the power, the award will be upheld if the court is “not prepared to say” that it is “so indefinite and uncertain as to be incapable of execution; and therefore absolutely void.”<sup>3</sup>

**Effect of the Existence of Uncertainty.** — The effect of the existence of uncertainty in the award is necessarily to avoid it. In fact, it renders that which purports to be an award no award at all. For an award is a final and conclusive determination of certain matters; an instrument of which the force, meaning, or operation is left uncertain, is not such a determination, and therefore is not, properly speaking, an award at all.

**Cases illustrative of fatal Uncertainty.** — Some cases where the uncertainty is of a very obvious nature are furnished by the English reports, and collected by Mr. Russell, as follows: An award that one party shall pay to the other so much money as is in conscience due, without settling what is due, is bad.<sup>4</sup> So is an award that one shall pay so much as land is worth, the value of the land remaining undetermined.<sup>5</sup> An award that one shall pay the money due for certain labor, not

<sup>1</sup> *Akely v. Akely*, 16 Vt. 450.

<sup>2</sup> *Schuyler v. Van Der Veer*, 2 Caines, 235.

<sup>3</sup> *Strong v. Strong*, 9 Cush. 560.

<sup>4</sup> *Watson v. Watson*, Sty. 28; and see *Kingston v. Kincaid*, 1 Wash. C. C. 448.

<sup>5</sup> *Titus v. Perkins*, Skin. 247.

naming the sum, is uncertain.<sup>1</sup> So is an award that one shall pay certain arrears of rent, falling due after the purchase by a stranger of certain lands, but not naming the amount of such arrears nor the time from which they are to be calculated.<sup>2</sup> And so is an award that a certain commodity shall be paid for at the market price, without saying at what place the market price is to be taken ; since the rate may well differ at different places.<sup>3</sup> And an order that one should pay a moiety of a debt for which A. is bound, not saying in what sum, is bad.<sup>4</sup>

To these may be added also the following, where the entire absence of description of the articles referred to obviously avoided the award, to wit: An order for the delivery of " a certain obligation,"<sup>5</sup> and an order for the delivery of " three boxes and several books,"<sup>6</sup> without further specification or identification, were both held to be void for uncertainty.

A cause, together with all matters in difference, were referred. In the cause a verdict was taken for a specified sum in damages, but subject to the award of the referee, who was authorized to order a verdict to be entered for either party, as he should see fit. He ordered a verdict to be entered for the plaintiff, not, however, stating for what sum ; and that the defendant should pay the plaintiff a certain sum. The award was declared bad for uncertainty, inasmuch as it was not clear whether the arbitrator intended the verdict to stand for the amount as originally taken, and the payment by the defendant to be in respect of matters out of the cause, or whether he intended the sum ordered to be paid by the defendant to be substituted for the nominal verdict and to be the complete settlement.<sup>7</sup>

<sup>1</sup> Pope v. Brett, 2 Saund. 292.

<sup>2</sup> Massy v. Aubrey, Sty. 365.

<sup>3</sup> Hurst v. Bambridge, Rolle's Abr. Arb., Q. 7, p. 263 ; Com. Dig. Arb., E. 11. See Waddle v. Downman, 12 Mee. & W. 562, *post*.

<sup>4</sup> Gray v. Gray, Rolle's Abr. Arb., Q. 2, p. 263 ; Com. Dig. Arb., E. 11.

<sup>5</sup> Bedam v. Clerkson, 1 Ld. Raym. 123.

<sup>6</sup> Cockson v. Ogle, 1 Lutw. 550.

<sup>7</sup> Mortin v. Burge, 4 Ad. & El. 973.

**Certainty created by Presumption.**—The rule that every reasonable presumption and intendment is to be made for the purpose of upholding the validity of an award or report, often comes to the aid of an instrument which, without some such assistance, would have to be condemned as uncertain. An award, made in the settlement of a partnership, that A. and B. pay a certain sum to their copartner C., who shall retain from it a certain amount, with the balance pay all the joint debts, and divide any surplus equally among the three, has been declared to be upon its face sufficiently certain. “For aught we can see, or is averred,” said the court, “the debts due in the case before us might be quite easy of liquidation, perhaps were agreed on by the parties; and if a thing extrinsic, ordered to be done by the award, *may* be certain, the rule now is to intend that it is certain till the contrary appear by averment.”<sup>1</sup>

An award ordered that the plaintiff and defendant should pay the costs of certain actions in certain proportions respectively; also that the sums which they had severally expended about the actions should be allowed as part of the respective proportions of the costs so ordered to be borne by each. The amounts thus expended were not stated. The court said that if there were no dispute as to these amounts, the award was certain and final; but *aliter*, if there were such dispute. But inasmuch as the fact of the existence of any such dispute had not been pleaded, the court would presume that there was none, and would uphold the award.<sup>2</sup> This has become a leading cause in England, and many subsequent adjudications have been expressly based upon it.

An arbitrator ordered two persons to pay a debt in the proportion of the shares held by them respectively in a certain ship, but did not state what these shares were. Inasmuch as it did “not appear that it was in dispute between the parties

<sup>1</sup> Case *v.* Ferris, 2 Hill, 75.

<sup>2</sup> Cargey *v.* Aitcheson, 2 Barn. & Cr. 170.

what these shares were," the court held the award to be sufficiently certain and final.<sup>1</sup>

Where the affairs of two partnerships were submitted to arbitration, and one person, who was a member of both firms, was ordered to make a certain payment to each firm, but nothing was said of the proportions in which division was to be made between the partners in one firm, it was held that the award fulfilled the condition of certainty to a common intent; for the presumption would be that the partners were equally interested in the proceeds of the partnership, and were entitled to share equally in the payment ordered to be made.<sup>2</sup>

**The Favorable Presumption is strengthened if the Award be *de et super præmissis*.** — If an award purports to be made *de et super præmissis*, this fact may help to establish the element of certainty, when it might otherwise be considered to be absent. Thus where such an award ordered the defendant to pay to the plaintiff's attorney a certain sum, as the amount of the attorney's bill delivered, but did not state what the bill was for, the court sustained the award. For they said they would intend that the bill was respecting certain notices of appeal, constituting one of the matters submitted; since the context showed that the costs of the submission and reference, which were also submitted, were not included in the aforesaid sum ordered to be paid. The court, it was said, "ought to intend that this sum is for one of the matters submitted;" and since it was obvious that it could be for nothing else, it would be presumed to be for the notices of appeal.<sup>3</sup>

A submission recited that the parties were relatives and entitled to distributive shares of the estate of M., deceased intestate; that the estate of M. consisted of debts, farm-stock, cattle, and other effects; that differences of opinion had arisen as

<sup>1</sup> *Wohlenberg v. Lageman*, 6 Taunt. 251.

<sup>2</sup> *Henrickson v. Reinbach*, 33 Ill. 299.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 282; *Thorp v. Cole*, 2 Cr. Mee. & Ros. 367; 4 Dowl. 467.



to the value of the farm-stock, cattle, and other effects; and that the parties had agreed to submit all disputes to arbitration. The award purported to be made touching and concerning the matters in difference. It found that the defendant had moneys, farm-stock, and cattle to a certain amount, and after other directions, ordered him to pay to the several parties their respective distributive shares of M.'s estate. It will be observed that disputes were not alleged to have arisen as to the value of the *debts*, but that they were said to have arisen as to the "other effects," and that the award said nothing of the "other effects." But in view of the fact that its phraseology was equivalent to the allegation that it had been made *de et super præmissis*, the court upheld it as final and certain; for they said that they would presume that there was no dispute as to the amount of the debts, or of the respective distributive shares; and also, since the arbitrator had omitted the matter of the "other effects," they would presume that there were no such "other effects," save only the "moneys," which had been disposed of.<sup>1</sup>

An award ordered payment to be made of a sum of money, with interest to be computed from the date of the last settlement of accounts between the parties. What that date was the arbitrator did not specify. But "it appeared distinctly in proof that the date of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by them both." The award was upheld.<sup>2</sup>

**Evidence concerning the Existence of a Dispute.**—The language quoted from the foregoing case, would justify the inference that extrinsic evidence would be admissible to establish such an undetermined date, at least provided it were not disputed. As was said in the argument: "Suppose the award had directed the party to pay interest from the death of A. B., this would be capable of proof by allegation and evidence."<sup>3</sup>

<sup>1</sup> Perry v. Mitchell, 2 Dowl. & Low. 452.

<sup>2</sup> Plummer v. Lee, 2 Mee. & W. 495.

<sup>3</sup> Ibid.

In another case, affidavits were introduced to show whether or not a sum, not specifically named by the arbitrators, was in dispute, and what in fact it was. The affidavits appear to have been admitted and considered, but with reluctance. Coleridge, J., said that they left it in doubt whether the matter was or was not in difference; "and this shows the inconvenience of looking at affidavits on such a question."<sup>1</sup>

**Certainty by Implication from an Award of Costs.**—An award may be certain by virtue of a manifest and necessary implication. Thus a report of referees in a pending cause, that the one party shall recover costs of the other, necessarily implies a decision of the point in controversy in favor of the former.<sup>2</sup> Where such a report had been returned, Chief Justice Parker said that, "by necessary implication, it must be considered as a determination upon the question." The arbitrators could not have awarded that the defendants should recover the costs of the action, "without having decided the point in controversy in their favor; at least the legal presumption is, that they so determined." Accordingly the judgment of the court was, "that the plaintiffs take nothing by their writ, and that the defendants recover their costs."<sup>3</sup> And again it was said: "The legal presumption is, that they could not have made this award, without having decided that the plaintiff had not maintained the action submitted to their determination."<sup>4</sup>

A suit having been instituted for the burning of a barn, the parties afterward submitted by bonds, in which they agreed to discontinue the suit and submit all questions touching the destruction of the barn to the arbitrators. The award recited these facts and that the arbitrators had examined into the case,

<sup>1</sup> *In re Marshall & Dresser*, 3 Q. B. 878.

<sup>2</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray, 418; *Rixford v. Nye*, 20 Vt. 132; *Hicks v. Gleason*, ib. 139; *Lamphire v. Cowan*, 39 id. 420; and see the chapter on Rules of Construction; also the case of *Hanson v. Webber*, 40 Maine, 194, fully stated in the chapter on Mutuality.

<sup>3</sup> *Inhabitants of Buckland v. Inhabitants of Conway*, 16 Mass. 396.

<sup>4</sup> *Stickles v. Arnold*, 1 Gray, 418.

&c., and ordered that the said suit should be no further prosecuted, and that the plaintiff should pay to one of the defendants a certain sum for his costs and expenses. Judge Kent, in upholding the certainty of the award, said that it was a "determination of the merits of the cause. . . . This award could not have intended merely a cessation of the suit referred to in the bond and award, with liberty to institute a fresh suit on the same matter. This would have rendered the award altogether useless and absurd. . . . The palpable intent and meaning of the award was, that the *charge* of the plaintiff was not supported, and that the same should be no further prosecuted and should for ever cease."<sup>1</sup>

**A Case where Implication was not allowed.**—A case where it might have been supposed that the court would have considered the award to be certain by implication, but where they refused to do so, is as follows: A chancery suit had been brought to rescind an agreement. It was referred, and the main question in the reference was, whether the agreement should be rescinded and the suit put an end to. In his award the arbitrator ordered certain things to be done, and that performance of these should be taken to be in full satisfaction of all matters in difference, and that each party should bear his own costs of the suit. But the award was set aside for uncertainty, because the arbitrator did not clearly determine the matters of whether or not the agreement should be rescinded and the suit terminated.<sup>2</sup> Russell, in commenting on the case, considers that it was doubtful whether the award had decided the question referred.<sup>3</sup>

**An Order for the Payment of Costs is certain.**—The rule has been laid down, and is well established in England, that an award that either party shall pay the costs, in whole or in part, of a cause submitted, or apportioning the costs in a specified

<sup>1</sup> *Purdy v. Delavan*, 1 Caines, 304, Lewis, C. J., dissenting.

<sup>2</sup> *In re Tribe & Upperton*, 3 Ad. & El. 295.

<sup>3</sup> Russell on Arb., 3d ed. p. 275.

ratio between the parties, will be upheld as sufficiently certain. For the costs "will be taxed as a matter of course by the officer of the court, whose peculiar duty it is to settle their amount, and who in so doing is considered as acting rather in a ministerial than judicial capacity."<sup>1</sup> The same rule unquestionably prevails and is universally acted upon in the United States. But I have found it nowhere specifically stated in any judicial decisions, probably for the reason that it has never been considered worth while to draw it into question.

The principle by which an order that the costs of a suit be paid by a party, without naming the amount, is held to be good is also partially considered in the chapter on Finality.

**Costs of a Reference.** — It should be observed, however, that the rule is applicable only to the costs of a *pending cause*. If an order be that the costs of the arbitration be paid by a party, without specifying their amount, a different result might be reached, by reason of the fact that these are not taxable, and therefore not to be established in accordance with a fixed rule and by a merely ministerial act. Though if there be a reference out of court, and the rules of the court provide for a taxation of costs in a reference, as is the case in England, the rule may again come into operation with the revival of the reason for it. The following case is an authority to this effect.

If a reference entered into by agreement stipulates that it may be made a rule of court, the costs of the reference may be taxed by the officer of the court, and their amount need not therefore be named by the arbitrators. For example, where an award under such a submission ordered the defendant to pay the plaintiff's attorney his costs of attending the arbitration and procuring the signature of his clients and other parties to the enlargement of time, it was held that these directions were

<sup>1</sup> Russell on Arb., 3d ed. p. 279; *Pedley v. Goddard*, 7 Term, 73; *Hanson v. Liversedge*, 2 Vent. 242; *Cargey v. Aitcheson*, 2 Barn. & Cr. 170; *Holdsworth v. Borsham*, 31 L. J. Q. B. 145; and same case in error, 32 L. J. Q. B., under the name of *Holdsworth v. Wilson*. See also a number of cases collected in the chapter on Finality.

sufficiently certain, since these costs would be taxed by the Master.<sup>1</sup>

The Award must order the Payment of "Costs" in Terms or by a clearly equivalent Phrase. — The order must be distinctly for the payment of *costs*, so that it is to be construed as meaning the ordinary taxable costs of court. Otherwise it will be too indefinite to come within the operation of the general principle. Thus, in an old case, an order that the defendant should pay all "reasonable expenses," which the plaintiff had sustained about the suit, was held so uncertain as to be void.<sup>2</sup> And so was an order for the payment of all charges spent at the making of the award.<sup>3</sup> In a later case, the award ordered the defendant to pay the plaintiff all such costs, charges, and expenses as the plaintiff had been put to in a certain cause then depending between these parties. The court construed the direction as intending only such costs as the officer of the court would allow and tax, and upon this basis sustained the award as sufficiently certain and good.<sup>4</sup>

An award that one party should pay the other all such moneys as the latter had expended about the prosecution of a certain suit, was held sufficiently certain; for the reason, as it was said, that the amount could be ascertained by the attorney's bill.<sup>5</sup> Again, where an award ordered the defendant to pay the charges of a suit then depending between the plaintiff and defendant, and that the plaintiff should give the defendant a bill of these charges, it was held that the award was sufficiently certain, inasmuch as the charges would be ascertained by the bill delivered.<sup>6</sup> Russell, in commenting upon these cases, says that they "are strictly in accordance with the pres-

<sup>1</sup> Russell on Arb., 3d ed. p. 280; *Thorp v. Cole*, 2 Cr. Mee. & Ros. 367; 4 Dowl. 457.

<sup>2</sup> *Bargrave v. Atkins*, 3 Lev. 413.

<sup>3</sup> *Pinkney v. Bullock*, cited in *Bargrave v. Atkins*, 3 Lev. 413.

<sup>4</sup> *Fox v. Smith*, 2 Wils. 267.

<sup>5</sup> *Beale v. Beale*, Cro. Car. 383.

<sup>6</sup> *Linfield v. Ferne*, 3 Lev. 18.

ent holding of the courts, if we may presume that they meant the attorney's bill after taxation, which reduces the amount, if disputed, to a certainty."<sup>1</sup>

**Failure to name party to whom Costs are to be Paid.**—An order that a party pay the costs of an action or reference is not uncertain because it fails to specify to whom they are to be paid. The natural intendment is that they are to be paid to his adversary.<sup>2</sup>

**Award referring to Something extrinsic.**—It has been stated in the discussion of the matter of Entirety that the award may refer to extrinsic instruments. But it is an essential proviso that if an award does thus refer to such instruments, and is incomplete without them or without proof of their contents, it will be void unless these instruments either accompany it, or are so fully described in it as to leave no possible uncertainty concerning their identification.<sup>3</sup> Such must be regarded as the general rule if the reference be to a written document. In Illinois, the court said, in a general way, that if an award "can, with tolerable ease, be reduced to certainty, as by reference to any written document, or the inspection of any particular thing (a house or land)," it will be good.<sup>4</sup>

It has been laid down, generally, in some cases, both English and American, that if any thing be referred to in an award, by which any uncertainty existing upon the face of the award itself can be cured, reference should be had to this external source of information.<sup>5</sup>

An English case, where a reference to an extrinsic document was allowed for the purpose of explaining or determining an

<sup>1</sup> Russell on Arb., 3d ed. p. 280. See also upon this subject the case of *Cargey v. Aitcheson*, 2 Barn. & Cr. 170, fully stated in this chapter in the discussion of the subject of Favorable Presumptions.

<sup>2</sup> *Baily v. Curling*, 20 L. J. Q. B. 235.

<sup>3</sup> *Hollingsworth v. Pickering*, 24 Ind. 435.

<sup>4</sup> *Henrickson v. Reinbach*, 33 Ill. 299.

<sup>5</sup> *Butler v. Mayor, &c., of New York*, 1 Hill, 489, citing *Cargey v. Aitcheson*, 3 Dowl. & Ry. 433; 2 Barn. & Cr. 170; 2 Bing. 199; M'Lel. 367.

amount not named or ascertained in the award otherwise than by reference to such document, is as follows: The award was that the defendant should pay to the plaintiff's attorney a certain sum, which was stated to be the amount of the attorney's bill delivered. The bill included charges for professional services rendered to another as well as for those rendered to the plaintiff. The award was held sufficiently certain, though it did not determine or specify the amount of the plaintiff's share of the bill. For since it was stated that the bill had been already delivered, it was said that the sum due from the plaintiff upon it could be at once ascertained by reference to it.<sup>1</sup>

If so liberal a rule is to be allowed to prevail, it would certainly seem as though the following case was harshly, if not wrongly decided. In a submission between part-owners of a vessel, an award that "there is due to C. the amount collected on policy of insurance held by F. for his (C.'s) sixteenth part of barque S.," was held bad for uncertainty, since it did not appear whether any money, or how much, had been then collected, and therefore the door for controversy was not conclusively closed. "The question of amount" was said to "present a disputable fact, even if it is admitted that the award is sufficiently clear as to the general fact of indebtedness. . . . A verdict could not be found for the plaintiff on the submission and award alone, as the award makes no reference to any fact or document, from which a judgment could be made up."<sup>2</sup> But this ruling of the court, if inconsistent with the old rule laid down by Rolle, will probably be regarded as the sounder of the two. The case is at least an intimation that a stricter rule than that of *Beale v. Beale* will be followed in our courts; and is authority for saying that some specific document must be referred to, and that a mere general possibility of arriving at certainty from outside sources is insufficient.

A submission was made concerning all controversies relating

<sup>1</sup> *Thorp v. Cole*, 2 Cr. Mee. & Ros. 367; 4 Dowl. 457. And see *post*, in this chapter, the paragraph on Certainty in Directions concerning Costs.

<sup>2</sup> *Colcord v. Fletcher*, 50 Maine, 398; and see *post*, the cases in the paragraph entitled Certainty in Awards ordering Payments.

to a certain voyage. The award ordered that one party should pay his share of the expenses of the voyage, and should allow, on account, his share of the loss which should happen in the voyage. The award was held good, on the ground that the expenses and losses might be ascertained with certainty.<sup>1</sup>

But doubt was expressed by Baron Alderson, in a later case, in which *Beale v. Beale* was relied upon as a precedent, whether any action could be maintained upon such an award.<sup>2</sup>

**Certainty in Awards ordering Payments.** — If an award orders money to be paid, it will obviously be uncertain, and also not final, unless it either names the sum or furnishes sufficient means by which the sum can be ascertained. If the latter course is pursued, it is essential that the process necessary to be gone through with, in order to arrive at the sum, should be clearly pointed out, and should be of such a nature that no dispute can arise concerning it. The subject has been already partially discussed in the chapter on Finality, since in defects of this kind the want of certainty and the want of finality are nearly akin. If so simple an arithmetical calculation as the striking a balance of determined items alone remains to be done, involving only addition and subtraction of known amounts, the award will be certain.<sup>3</sup>

A reference was entered into between the assignees of a bankrupt and a banking company, concerning some bills of exchange deposited with the company by way of security. The arbitrator awarded that the bills and moneys secured thereby were the property of the assignees; that the bills, moneys, and proceeds should be paid over to the assignees; and that if the bank had received any part of the money secured

<sup>1</sup> *Beale v. Beale*, Rolle's Abr. Arb., H. 14. The same remark has been made, but by way of illustration only and not as a ruling, and probably on the strength of this classic English authority, in some cases in the United States. *Kingston v. Kincaid*, 1 Wash. C. C. 448; *Butler v. Mayor, &c.*, of New York, 1 Hill, 489.

<sup>2</sup> *Perry v. Mitchell*, 2 Dowl. & Low. 452, at p. 457.

<sup>3</sup> *Waite v. Barry*, 12 Wend. 377 (fully stated in the chapter on Finality); *Kendrick v. Tarbell*, 26 Vt. 416; *Butler v. Mayor, &c.*, of New York, 1 Hill, 489; *Higgins v. Willes*, 3 M. & R. 382; *Hopcraft v. Hickman*, 2 Sim. & St. 130.



by the bills of exchange, this amount also should be paid over to the assignees. It was held that the award was bad, by reason of its failure to determine what amount, if any, had been received by the bank in respect of the bills of exchange.<sup>1</sup>

One of the stipulations in a submission provided that the arbitrator should direct the plaintiff to pay into a bank such a sum of money as would be sufficient to entitle the defendant to have restored to him some documents which he had deposited with the bank as security for advances. The arbitrator, following the submission, ordered that the plaintiff should pay to the bankers such a sum of money as would entitle the defendant to have his securities restored to him. The award was held to be neither certain nor final, by reason of the failure to ascertain and order payment of a specified sum, as being the amount necessary to be paid in order to entitle the defendant to a release of his securities. If the payment were not made, it was said, there could be no remedy on an award so uncertain as this.<sup>2</sup>

In an arbitration between W. and F., under a building contract, the award was that to complete the house "is worth and will cost \$612.50;" and that said W. shall be allowed that sum out of the contract price, additional to the amount already paid by said W. to said F., and in addition to any sum or sums of money he may be obliged to pay to discharge any and all liens on said house, and the lot on which it stands; and also, that said W. shall take the house as it now is, and shall pay to said F. the excess, if any there shall be, of the contract price over the said sum of \$612.50, the amount of the liens and costs thereon, and the sum already paid by said W. to said F. on said contract. And if the sum already paid and the amount of lien, claims, and costs thereon and the sum of \$612.50 shall be more than the contract price, said F. shall pay the difference to said W. Held, that "the sum which the award requires W. to pay to

<sup>1</sup> *In re Marshall v. Dresser*, 3 Q. B. 878.

<sup>2</sup> *Hewitt v. Hewitt*, 1 Q. B. 110.

F. as the excess, if any, of the contract price over the sum of \$612.50, &c., and also the sum which the award requires F. to pay W., if the sum already paid and the amount of lien, claims, and costs and the aforesaid sum of \$612.50 shall be more than the contract price, are both entirely uncertain, and cannot be made certain by any means afforded by the award.”<sup>1</sup>

In Pennsylvania, it was held that an award of a certain sum to be paid for a tract of land, from which, however, were to be deducted the amount of all legal and equitable claims against the land, was bad, as being neither certain nor final, since it did not specify this amount.<sup>2</sup>

**Awards leaving a Calculation to be made.** — Russell lays down the broad doctrine that, “If the arbitrator give the rule for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain, according to the general rule, “*id certum est quod certum reddi potest.*”<sup>3</sup>

**Awards ordering a Computation of Interest.** — An award that a certain sum be paid, “with interest,” is certain.<sup>4</sup> There is no occasion for the actual calculation to be made by the arbitrator.

The question submitted was whether one party was liable to pay interest upon a certain sum to the other. The arbitrator apparently only found that he was so liable. It was objected that he ought to have ascertained the amount. But Bayley, J., said: “If he gives you the rule by which the amount is to be ascertained, the rest is mere matter of addition.”<sup>5</sup>

The subject is further discussed in the chapter on Finality.

**Orders for Payment at the “Market Price.”** — It would seem

<sup>1</sup> Fletcher v. Webster, 5 Allen, 566, decided upon the authority of Waite v. Barry, 12 Wend. 377, which is fully stated in the chapter on Finality.

<sup>2</sup> Spalding v. Irish, 4 Serg. & R. 322.

<sup>3</sup> Russell on Arb., 3d ed. p. 280; citing Higgins v. Willes, 3 Man. & Ry. 382; Hopcraft v. Hickman, 2 Sim. & St. 130.

<sup>4</sup> Emery v. Hitchcock, 12 Wend. 156.

<sup>5</sup> Higgins v. Willes, 3 Man. & Ry. 382.

from the case of *Hurst v. Bambridge*,<sup>1</sup> that an order for payment to be made for any merchantable commodity at the market price thereof, at a certain place and time, is sufficiently certain. Probably, however, it might be shown by extrinsic evidence that no market price was established at such place and time. It was submitted to an arbitrator to determine whether or not the plaintiff was entitled to recover in respect of some articles of iron machinery furnished to the defendant, with the stipulation that if he should find in the negative he should allow the plaintiff the value of them at the market price of pig-iron, since the defendant still retained possession of them. The award ordered the defendant to pay for them at the present market price of pig-iron, and was held good and certain. For, in fact, the real question submitted was, whether the articles were to be paid for as machinery or as pig-iron.<sup>2</sup>

**Certainty in the Description of a Debt.** — If the description of a debt is sufficient to identify, with reasonable freedom from doubt, the debtor, the creditor, and for what matter the debt is owing, the award will not be uncertain; *e. g.*, a finding that A. owes a sum to B. for "the T. oxen," is good.<sup>3</sup>

**Certainty in a General Award.** — An award may be certain, though it does not pass upon each demand separately, but combines all in one general determination and order. Thus, under a general submission of all demands and controversies, an award of a certain sum as due from one party to the other is sufficiently certain as a full execution of the submission.<sup>4</sup> Such awards made under submissions of this nature are to be distinguished from the like awards made in pursuance of submissions, which, in terms, require an award to be made as to

<sup>1</sup> Rolle's Abr. Arb., Q. 7, p. 263, stated *ante*, in this chapter, in the paragraph entitled Cases illustrative of Fatal Uncertainty.

<sup>2</sup> *Waddle v. Downman*, 12 Mee. & W. 562; *Russell on Arb.*, 3d ed. p. 277.

<sup>3</sup> *Lamphire v. Cowan*, 39 Vt. 420.

<sup>4</sup> *Shirley v. Shattuck*, 4 Cush. 470; *Strong v. Strong*, 9 id. 560; *Emery v. Hitchcock*, 12 Wend. 156; *Gray v. Gwennap*, 1 Barn. & Ald. 106; *Karthauss v. Ferrer*, 1 Pet. 222.

several distinct matters, as was the case in *Houston v. Pol-lard*<sup>1</sup> and *Rider v. Fisher*.<sup>2</sup>

A submission concerning a building contract left to the arbitrators "to say what deduction shall be made in favor of said M., and what balance shall be due." An award that a certain balance was due and should be paid, was held good, though nothing was said on the subject of the deduction. For the amount to be deducted was presumed to have been taken into consideration in arriving at this sum of which payment was ordered.<sup>3</sup> So, again, the language was repeated in another case: "the arbitrators, in finding the balance due to a party, do also necessarily find what deduction, if any, should be made for his claim, as certainly as if they had in express terms stated the sum which they deducted."<sup>4</sup>

**Certainty as to the Time of performing an Act ordered.**—On the strength of the old English cases Russell lays down the rule of law to be, that if the arbitrator orders one party to pay money or to execute a release to the other, without mentioning any time within which it is to be done, the award is nevertheless sufficiently certain. For if a request to do the act be necessary, it must be done within a convenient time after the request shall have been made; if no request be necessary, performance must be within a reasonable time.<sup>5</sup>

But a different rule is apparently established in the United States, by the following decision of Chief Justice Marshall. An award found that A. was entitled to a certain credit on account of sales of lands to B., provided B. "shall grant or cause to be granted to the said A. a clear unincumbered and satisfactory title" to said lands, but omitted to limit the time within which such title is to be made. The award was held to be void by reason of this omission. For since no time was limited within

<sup>1</sup> 9 Metc. (Mass.) 164.

<sup>2</sup> 5 Scott, 86.

<sup>3</sup> *Bigelow v. Maynard*, 4 Cush. 317.

<sup>4</sup> *Strong v. Strong*, 9 Cush. 560, at p. 564.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 275; *Freeman v. Bernard*, 1 Salk. 69.

which the title was to be made, it was said that the "question whether this credit was to be allowed or disallowed, was left indefinitely open;" and the court could not supply the omission, since to do so would be to usurp a proper function of the arbitrators.<sup>1</sup>

An award to pay a sum "on the *said* first day of May," no such day having been previously mentioned, was once held void. But it is not to be imagined that this antique specimen of legal rigidity would be regarded as an authority to be followed in our day, provided the year were certain.<sup>2</sup>

It has been more reasonably and liberally declared that if the award be without a date, and contain an order that a party do a certain act within a certain number of days after the date of the award, it will not for this deficiency be so uncertain as to be invalid; but the computation will be made as if the award had borne date on the day of its delivery, for "that was one sense of *datus*."<sup>3</sup>

But where an award ordered that a certain sum should be paid, or be secured to be paid, within a week from the date of the award; the court said that the money must be paid or else security satisfactory to the payee must be given within the time specified. But in fact the award was considered as a good award for the payment of the money and the alternative concerning the security, which would probably have been bad on at least two different grounds, was regarded as practically a nullity; since, had the debtor offered the creditor such security as was satisfactory to the latter, it would have been accepted in the natural course of events, without any direction from the arbitrator.<sup>4</sup>

**Certainty as to Place of Payment.** — If a payment of money

<sup>1</sup> *Carnochan v. Christie*, 11 Wheat. 446.

<sup>2</sup> *Markham v. Jennings*, Rolle's Abr. Arb., 254, 263; Com. Dig. Arb., E. 11.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 275; *Armitt v. Breame*, 2 Ld. Raym. 1076; 1 Salk. 76.

<sup>4</sup> *Simmons v. Swaine*, 1 Taunt. 548. See the statement of this case in the discussion of the subject of awards in the alternative.

be ordered to be made, there is no necessity for specifying the place where it shall be done.<sup>1</sup>

**Certainty as to Persons.** — An award must possess the quality of certainty as regards persons as well as in other particulars. By whom any act is to be done, or towards whom it is to move, must be distinctly stated or clearly implied, so that there can be no reasonable doubt concerning it. But it is not necessary actually to specify by name. Thus an award directing money to be paid “to the executors of A. B., deceased,” without naming them, has been held sufficiently certain, since it is easy to learn who are the executors.<sup>2</sup> And an order that a party pay the costs, without saying to whom, is good, for it will be intended that he is to pay to the opposite party.<sup>3</sup>

An order that a nuisance, erected on the defendant’s land, should be pulled down, is not uncertain by reason of its failure to say by whom the pulling down shall be done. For since the defendant is the owner of the soil, the intendment will be that he is to do it. “Though any person, or the plaintiff, might remove the nuisance, yet that shall never be intended to be the design of the arbitrators, who intended to make an amicable end of this difference.”<sup>4</sup>

A third person became a party to an order of reference of a cause and all matters in difference. By the submission the arbitrator was required to settle all matters in difference between the plaintiff and the defendant, and also all matters in difference between the defendant and the third person. In his award the arbitrator failed to distinguish between the amount of damages to be paid by the defendant to the third party, and the amount also to be paid by him to the plaintiff; but simply awarded that the defendant should pay a gross sum to the plaintiff and the third person jointly. The court refused,

<sup>1</sup> Russell on Arb., 3d ed. p. 275; Anon., 1 Keb. 92; 2 Brownl. 309.

<sup>2</sup> Grier v. Grier, 1 Dall. 173.

<sup>3</sup> Baily v. Curling, 20 L. J. Q. B. 235.

<sup>4</sup> Armitt v. Breame, 2 Ld. Raym. 1076; 1 Salk. 76; Com. Dig. Arb., E. 11.

upon application, to enforce the award summarily. "More particularly as there is still another remedy open to the party."<sup>1</sup> Subsequently, this other remedy having been sought in an action of debt upon the award, the court stopped the counsel for the plaintiff and ordered an entry of judgment for him.<sup>2</sup>

But where claims against a person in his individual right, and also in a representative capacity, are both embraced in a submission, the award must distinguish between the two classes. Otherwise, it is open to "solid objection."<sup>3</sup>

An award ordered the defendant, *or his executors or administrators*, to execute a release to the plaintiff. It was held not to be void for uncertainty; Holt, C. J., saying, that the introduction of the executors and administrators into the award was a mere cautionary proceeding, having no effect to vitiate it, and, in fact, having apparently no effect at all, since these personal representatives would have been equally bound by the award though they had not been named.<sup>4</sup>

A submission required the arbitrator to state at what price the defendants or A. B. should purchase certain land. Following this literally, the arbitrator awarded that the defendants or A. B. should purchase it at a price named. The award was held void for uncertainty, by reason of the failure to determine whether the purchaser should be A. or B. "Against whom," said Baron Hullock, "are you to ask for an attachment?"<sup>5</sup>

An award that a certain sum is due to the defendant from A., B., and C., "some or one of them," and ordering that it shall be paid by them, "some or one of them" is obviously void for uncertainty.<sup>6</sup>

<sup>1</sup> *Hawkins v Benton*, 2 Dowl. & Low. 465.

<sup>2</sup> *Hawkins v Benton*, 15 L. J. Q. B. 139; 8 Q. B. 479.

<sup>3</sup> *Lyle v. Rodgers*, 5 Wheat. 394 (*per Marshall*, C. J.).

<sup>4</sup> *Freeman v. Barnard*, 1 Ld. Raym. 247; *Bac. Abr. Arb.*, E. 4; *Dawney v. Vesey*, 2 Vent. 249.

<sup>5</sup> *Lawrence v. Hodgson*, 1 Younge & Jer. 16.

<sup>6</sup> *Rainforth v. Hamer*, 25 L. T. 247; *Russell on Arb.*, 3d ed. p. 278.

An order that payment be made to A., or to his attorney in the cause, is good. The court say that it is a "very convenient form, and saves the necessity of going through the useless ceremony of a demand under a power of attorney." The demand having been made by the attorney, "the order will be to pay the money to the plaintiff on that demand. There could be no judgment in the name of the attorney."<sup>1</sup>

**Certainty in the Description of Real Estate.**—The cases suffice to establish no definite rule concerning what is or what is not a sufficiently certain description of real estate in an award. On the one hand, a precise description by metes and bounds is evidently not indispensable; whereas, upon the other hand, some of the cases would seem to require a considerable degree of accuracy. I see no better course to pursue in this matter than to give statements of the several cases which I have found. Perhaps the strictest requisitions are contained in the following:—

It has been elsewhere said that an award concerning title to real estate, or boundary lines, is sufficiently certain only where it would enable an officer to give possession of the premises and to designate the limits by metes and bounds. If it falls short of this, it is "indecisive of the matter in issue," and therefore bad.<sup>2</sup> This remark, however, goes much further than was rendered necessary by the facts of the case; for the award contained no manner of description, beyond the mention of "two pieces of land" and "the said premises," and was obviously not even intelligible.<sup>3</sup>

An award of commissioners, appointed to determine the rights of claimants of land under a patent, ordered that certain of the parties should hold certain of the land "according to their respective possessions, for ever." It was held that the

<sup>1</sup> *Hare v. Fleay*, 11 C. B. 472.

<sup>2</sup> *Aldrich v. Jessiman*, 8 N. H. 516.

<sup>3</sup> See *Murray v. Bruner*, 6 Serg. & R. 276; *Schuyler v. Van Der Veer*, 2 Caines, 235; *Brown v. Hankerson*, 3 Cow. 70.



award was, in this respect, "certain, to a common intent." There could be no doubt that the commissioners meant "the actual possessions" of these parties. "An actual possession, *quasi pedis possessio*, is susceptible of clear and definite proof; and no lands can be conveyed by any possible mode of expression, dispensing with the necessity of parol proof to locate it." This description would be sufficient in a deed;<sup>1</sup> and "we cannot require more certainty of description in an award than what the law requires in describing land conveyed by deed. Nor are we to intend, for the purpose of avoiding this award, that there is any uncertainty in these possessions. They may, for aught we know, be included within the most definite and permanent enclosures; and, if necessary to support the award, we ought to intend that to be the case."<sup>2</sup>

In another portion of the same award the arbitrators determined a location by courses and lines. It was argued that two of these lines were uncertain; but, apparently, no evidence was introduced to establish this fact. Accordingly the court said: "This we cannot say; for aught that appears both lines may be as well known and as perfectly certain as any lines ever run. There may be marked lines at every rod's distance, or the most durable monuments. It ought to have appeared affirmatively that there were no such lines, or that they were indefinite and vague. We are bound to notice, too, that the commissioners have viewed the lands and caused a survey to be made of the same, and that they have annexed to their proceedings a map or diagram thereof. This map, being thus referred to, may be taken into consideration as part of the description of the boundaries, and by way of elucidating any thing obscure." In this case the map was said to render the two lines objected to "perfectly and mathematically certain."

An award was that B. and L. should reconvey "all lands heretofore conveyed or pledged to them by the late G. D. as a

<sup>1</sup> Vin. Abr. Grant; Co. Litt. 4, 6.

<sup>2</sup> Jackson v. Ambler, 14 Johns. 96, at p. 108 (*per* Spencer, J.).

collateral security." It appeared from the pleadings, the facts stated, and even the award itself, that G. D. had given conveyances upon their face absolute which were claimed to have been intended as collateral security. The award was held to be uncertain for not specifically determining what lands had been thus conveyed as security. "If the arbitrators had directed that *all* lands conveyed or pledged by G. D. should be reconveyed, there would have been some difficulty in ascertaining what lands had been conveyed or pledged, from the uncertainty where deeds might have been recorded, and whether grants might not have been deposited without a conveyance." But at any rate, "the question whether a conveyance was absolute or as a security only, was a material question," which ought to have been decided by the arbitrators, and not left open to be decided by the parties or some other tribunal. The non-decision of it leaves the award incomplete.<sup>1</sup>

A bill in equity set forth that the defendant had executed to the complainant certain deeds, one of which, however, conveying a fifty-acre lot, stipulated that the complainant should not come into possession of the land described therein until after the decease of the defendant. A subsequent controversy having been submitted, the arbitrators awarded that the defendant should quitclaim to the complainant "all his right and title to all his lands which he had heretofore deeded or attempted to deed to" the complainant. The deed of the fifty-acre lot was objected to as void; and it was said, that therefore the award was uncertain, since it might or might not include this lot. Judge Redfield said that the most which could be urged by way of uncertainty against this award was that "if it were a plea in bar, very likely it might be deficient in certainty on a general demurrer. But it is as certain as if it had referred to the deed of the very land, — or nearly so, upon the testimony, — for there is no other land *attempted to be conveyed* to which it could be referred."<sup>2</sup>

<sup>1</sup> *Lyle v. Rodgers*, 5 Wheat. 394, at pp. 408, 409.

<sup>2</sup> *Akely v. Akely*, 16 Vt. 450.

But if there be no description, save to say "two acres of land," or "the house," or "the farm," it is, of course, uncertain and void.<sup>1</sup>

An award described a brewery near the village of —, in which the parties had a joint interest. It was held to be sufficiently certain in its description, especially in the absence of evidence that there was any other brewery in that neighborhood, or that the parties were interested in more than one brewery.<sup>2</sup>

If a survey or map be annexed to the award and referred to in it, it is proper to rely upon it for an explanation and elucidation of the written findings. If by this aid the award becomes intelligible, it will be sufficiently certain.<sup>3</sup>

**An Award concerning the Price of Land.** — Where a submission, solely concerning the price of land, referred to a deed of the land to identify it, and the award referred to or followed the deed, it was held not to be void for uncertainty because it happened that the description in the deed was not definite.<sup>4</sup>

**Certainty in Awards concerning Boundary Lines.** — If an award defines a boundary line by monuments, and these monuments do not in fact exist at the time the award is made, it will be void for uncertainty. Also, extrinsic evidence is admissible to establish the fact of the non-existence of the monuments.<sup>5</sup>

An award was that a boundary line "shall be the line established by the survey of O. R., as exhibited by him to the arbitrators, and known at the hearing as the 'R. line,' viz.;" and then followed the description of the line by metes and courses. This was objected to on the ground that it was uncertain without referring to a plan, not annexed to the award

<sup>1</sup> *Murray v. Bruner*, 6 Serg. & R. 276; *Schuyler v. Van Der Veer*, 2 Caines, 235; *Brown v. Hankerson*, 3 Cow. 70; *Aldrich v. Jessiman*, 8 N. H. 516.

<sup>2</sup> *Byers v. Van Deusen*, 5 Wend. 268.

<sup>3</sup> *Darge v. Horicon Mining Company*, 20 Wis. 691; *Jackson v. Ambler*, 14 Johns. 96.

<sup>4</sup> *Day v. Hooper*, 51 Maine, 178.

<sup>5</sup> *Giddings v. Hadaway*, 28 Vt. 342.

and not being a public plan or survey, and not within the control of the defendant. But the court held that since the line was definitely described and could be run, without the aid of the plan, that the award was sufficiently certain.<sup>1</sup>

A submission was made in an action of ejectment of a dispute about a boundary line. Held, that an award, "in favor of the plaintiff by running a line" described, was sufficient to operate as awarding to the plaintiff all of the disputed land which lay upon his side of this line. Of the portion thus awarded to him "the plaintiff must take possession at his peril. If he takes land not included in the award, the court will do justice on a summary inquiry."<sup>2</sup>

**Certainty in an Award in an Action of Trespass to Real Estate.** — In an action of trespass *quare clausum* wherein the title to the *locus in quo* is contested by reason of a dispute concerning the boundary line, it is not necessary that the arbitrators should determine the line. If they find that the *locus* belonged to one or the other party, and award or refrain from awarding damages accordingly, it will be sufficient.<sup>3</sup>

**Orders concerning Mortgages.** — An order that a mortgagee shall re-assign the mortgaged lands, although it do not state for what period the re-assignment is to be, is good; for it will be intended to apply to the entire estate and interest covered by the mortgage.<sup>4</sup>

**Awards ordering Security.** — An award directing security to be given, but not specifying the nature and amount of the security, and otherwise not fully describing it, is void for uncertainty.<sup>5</sup> But where the arbitrator ordered a sum named to be paid, or that payment of it should be secured, within a certain

<sup>1</sup> Caldwell v. Dickinson, 13 Gray, 365.

<sup>2</sup> Massey v. Thomas, 6 Binney, 333.

<sup>3</sup> Ballard v. Mitchell, 8 Jones' Law, 153.

<sup>4</sup> Rosse v. Hodges, 1 Ld. Raym. 233.

<sup>5</sup> Jackson v. De Long, 9 Johns. 43; Barnet v. Gilson, 3 Serg. & R. 340; Hewitt v. Hewitt, 1 Q. B. 110; Tipping v. Smith, 2 Strange, 1024; Thinne v. Rigby, Cro. Jac. 314; and see Duport v. Wildgoose, 2 Bulstr. 260.

time, the court held that the party bidden to pay must either pay or give such security as should be satisfactory to the creditor.<sup>1</sup>

An order that the defendant enter into a bond to the plaintiff, conditioned that the plaintiff and his wife should enjoy certain lands, neglecting to specify the amount of the bond, is void for uncertainty. The amount can be ascertained only by one or other of the parties, and the arbitrators have no right to delegate such an authority, but must themselves make a certain determination.<sup>2</sup>

**Award concerning a Cause.** — An award concerning a cause that it “shall be no further prosecuted” is both certain and final. It is a good bar to a subsequent suit for the same cause of action.<sup>3</sup>

**Statute of Limitations.** — A statute of limitations, making five years a bar, was set up in defence to an action brought on the 20th day of February, 1863. The referee found that certain payments in dispute had been made “at sundry times between the 23d day of August, 1857, and May, 1858.” It was held that here was a fatal uncertainty, since it was “impossible to tell from this whether these payments had been made more than five years before this suit was brought, or within that period.”<sup>4</sup>

**Statement of Results.** — The fact that arbitrators have stated only the results at which they have arrived, without giving the grounds or processes of reasoning by which they arrived at these results, does not render the award open to the objection of uncertainty.<sup>5</sup>

**Duty of Party to correct Uncertainty.** — Where the findings of fact by a referee are imperfect, it is the duty of the dissatis-

<sup>1</sup> *Simmons v. Swaine*, 1 Taunt. 548; fully stated *ante*, p. 425.

<sup>2</sup> *Samon's Case*, 5 Rep. 77 b.

<sup>3</sup> *Purdy v. Delavan*, 1 Caines, 304. In this case Kent, J., discusses the English cases at length.

<sup>4</sup> *Doyle v. Reilly*, 18 Iowa, 108.

<sup>5</sup> *Lamphire v. Cowan*, 39 Vt. 420.

fied party to apply for more specific findings, and not to seek to avail himself of the defects. If he act contrary to this duty, the court will presume that the facts necessary to sustain the judgment were properly found.<sup>1</sup>

**Award ordering Payment from Assets.**— An award ordering an executor to make a certain payment out of the assets in his hands is sufficiently certain, though it does not find whether or not there are any assets in his hands.<sup>2</sup>

**How Uncertainty may be availed of.**— Mere uncertainty in an award forms no proper ground for the interference of a court of equity to set it aside. If it is so uncertain that it cannot be executed or enforced at law, it is void, and no resort to a court of equity is necessary either for prevention or relief.<sup>3</sup> From this it follows that in a suit at law upon an award, the objection of uncertainty can be set up, and will constitute a valid and proper defence. I have nowhere found this fact asserted in precise terms, but this is a common method of availing of the alleged defect, and it is never objected to as an incorrect method. Its propriety must therefore be regarded as established. Though it must be acknowledged that instances might arise when it would be a hardship to refuse to a party the privilege of bringing a bill in equity to avoid an award for uncertainty; as, for example, an award void for uncertainty might create a cloud upon a title to real estate, which could never be removed if the opposing party should not see fit to sue, and a bill in equity would not lie.

If an award is clearly void, on its face, for uncertainty, the defendant in a suit upon it may demur.<sup>4</sup>

But if a state of facts, on which the award would be good, can be supposed, *semble* that it would be the duty of the court, upon demurrer, to presume the existence of such facts. It

<sup>1</sup> Brainerd v. Dunning, 30 N. Y. 211.

<sup>2</sup> Russell on Arb., 3d ed. p. 276; Love v. Honeybourne, 4 Dowl. & Ry. 814.

<sup>3</sup> Perkins v. Giles, 53 Barb. 342.

<sup>4</sup> Hewitt v. Furman, 16 Serg. & R. 135.

would even be imperative to do so after a jury had given a verdict in favor of the award.<sup>1</sup>

If the award be returnable into court, the fact that it is not certain or not final may be made the basis of a motion to set it aside.<sup>2</sup>

A party who has not excepted to the findings of a referee cannot object to the report, nor have it reviewed on appeal. It must stand as a correct and final finding of the facts.<sup>3</sup> And if exceptions are taken and filed they must be incorporated in the case; otherwise the court of law will assume that none were in fact taken.<sup>4</sup>

**Explanation of Uncertainty.**— Arbitrators or referees are not competent witnesses for the purpose of explaining any thing vague or uncertain in the award or report.<sup>5</sup>

How far extrinsic evidence is admissible to prove that what *might* be uncertain is not so in fact, is a matter which has been already discussed.<sup>6</sup>

<sup>1</sup> Hewitt v. Furman, 16 Serg. & R. 135.

<sup>2</sup> Russell on Arb., 3d ed. pp. 658-661.

<sup>3</sup> Sutherland v. Rose, 47 Barb. 144, at p. 149.

<sup>4</sup> Ibid., at p. 150.

<sup>5</sup> Kingston v. Kincaid, 1 Wash. C. C. 448; Aldrich v. Jessiman, 8 N. H. 516; Ward v. Gould, 5 Pick. 291.

<sup>6</sup> *Ante*, in this chapter, in the paragraph entitled Evidence concerning the Existence of a Dispute.

## CHAPTER XVI.

### RULES OF CONSTRUCTION.

Ancient prejudice against arbitration.

Modern rule is to construe awards liberally.

The award is to be construed by the aid of the submission, &c.

Construing orders in excess of authority as merely cautionary.

An award may be good by manifest implication.

An award of costs may be good by implication.

An award in too general language may be restricted.

The degree of proof required to prevent such restriction.

Construction of awards concerning boundary lines.

Presumption in awards concerning boundary lines.

Explanation of awards concerning boundary lines.

Discrepancy between the submission and award concerning a boundary line.

Requisition that acts be done interchangeably or contemporaneously.

Every presumption and intendment will be in favor of the validity of the award.

The presumption is that the arbitrators have followed the submission.

Limit to the rule of favorable presumption.

Construction of a reservation of a question for the court.

Effect of inconsistency in an award.

Favorable construction of apparently inconsistent findings.

Explanations by the arbitrator.

**Ancient Prejudice against Arbitration.**—In old times a considerable degree of prejudice was often exhibited against the system of adjusting disputes by voluntary arbitration *in pais*. The established tribunals manifested jealousy of so irregular a substitute as was presented by a board of arbitrators, liable often to be composed either in whole or in part of laymen. It was not to be presumed that justice could be so wisely, as certainly it could not be so learnedly, administered by the unprofessional tribunal. Neither could the arbitrator issue executions and send sheriffs armed with all the powers of the law to enforce performance of his decree. For the sake of the disputants themselves, it was said that they should be preserved, even in their own despite, from the probable erroneousness and certain non-enforceability of the *rusticum judicium*.



**Modern Rule is to construe Awards liberally.**—It is well known, however, that this old-time hostility has long since disappeared. Courts are rather glad than otherwise, in the present busy age, to be relieved of any portion of those burdens of litigation which, without such assistance, they would be quite unable to bear. A sounder doctrine has prevailed for a century past. Because the arbitrators are judges chosen by the parties themselves, who, in entering into the agreement, are acting rationally in their own business and without compulsion, it has long since been the rule of the courts that the award is to be “liberally construed.”<sup>1</sup> Courts have now, it is said, departed from the ancient strictness, “which was a reflection on the administration of justice.”<sup>2</sup> This change is one which “we have no reason to regret, and awards ought to be viewed indulgently.”<sup>3</sup> “For the benefit of society critical niceties are discouraged.”<sup>4</sup> No sound reasons seem to exist “against so benign a construction of awards as will enable us to enforce them, wherever consistent with any judicial principles,” the purpose being “to give effect and operation to the intention of the arbitrators.”<sup>5</sup> Technical precision and certainty are never demanded. It is sufficient if the decision be so expressed that “plain men acquainted with the subject-matter can understand it.”<sup>6</sup> Such is the language of the tribunals of the United States. The old-fashioned rigidity had been pretty thoroughly dispensed with before these courts were established, and the principal traces of its existence are to be found in such statements as these, which seem to be necessary at all only for the purpose of showing that it is quite defunct.

<sup>1</sup> *James v. Thurston*, 1 Cliff. C. C. 367; *Smith v. Smith*, 4 Rand. 95; *Purdy v. Delavan*, 1 Caines, 304 (*per* Kent, J.); *Jackson v. Ambler*, 14 Johns. 96; *Walker v. Merrill*, 13 Maine, 173; *Spear v. Hooper*, 22 Pick. 144 (*per* Chief Justice Shaw); *Archer v. Williamson*, 2 Har. & Gill, 62; *Rixford v. Nye*, 20 Vt. 132.

<sup>2</sup> *Schuyler v. Van Der Veer*, 2 Caines, 235.

<sup>3</sup> *Jackson v. Ambler*, 14 Johns. 96.

<sup>4</sup> *Gonsales v. Deavens*, 2 Yeates, 539 (decided in 1800).

<sup>5</sup> *Archer v. Williamson*, 2 Har. & Gill, 62. So also in *Skillings v. Coolidge*, 14 Mass. 43.

<sup>6</sup> *Butler v. Mayor, &c., of New York*, 1 Hill, 489.

The modern doctrine in England is to the same purport. "An award," says Russell, "is to receive a liberal and sensible construction, and as far as possible to be governed by the intent of the arbitrator."<sup>1</sup> And again he says that the "courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the tribunal which the parties have selected, and which in so many instances acts beneficially for them."<sup>2</sup>

But the judges in laying down these rules of liberal interpretation frequently say that they must not be stretched too far; that an award must be certain and final. Speaking of such expressions, Judge Coleridge remarks that they appear "to be often used with too much strength. Awards are to be construed sensibly, as all other instruments."<sup>3</sup>

Thus, if the arbitrator directs an act to be done, but names no time within which it shall be done, a reasonable time for its performance will be intended.<sup>4</sup>

If it is ordered that a division of personalty be made among "heirs-at-law," the phrase may be taken to mean "all the testator's children living, and the child or children of any who died in his lifetime."<sup>5</sup>

**The Award is to be construed by the Aid of the Submission, &c.** — "In giving a construction to an award, the court is fully warranted in considering the surrounding circumstances, and in reading it in the light they afford. And of these circumstances are the articles of submission," and likewise a bond, executed pending the arbitration, whereby one of the parties bound himself to hold certain of the property in dispute, and either to give it up, if so ordered by the award, or, in lieu of surrendering it, to pay such sum for it as should be ordered.<sup>6</sup>

<sup>1</sup> Russell on Arb., 3d ed. p. 495.

<sup>2</sup> Ibid., p. 681.

<sup>3</sup> Stonehewer v. Farrar, 9 Jur. 203.

<sup>4</sup> Freeman v. Bernard, 1 Salk. 69.

<sup>5</sup> Smith v. Smith, 4 Rand. 95.

<sup>6</sup> Kanouse v. Kanouse, 36 Ill. 439.

**Construing Orders in Excess of Authority as merely cautionary.**—Where the arbitrator exceeds the scope of his authority in directing arrangements to be made, which he has no power to order, this portion of his award may sometimes be construed as being not strictly imperative, but rather explanatory, and a statement made to save possible misunderstanding. Thus, a submission was made of a specific demand for money, as due from S. to C., and of all other demands between the parties. The referees reported that S. should pay C. a certain sum; and added that, whereas it was admitted that C. had in his possession property of S. as security for advances, therefore it was awarded that this property should be sold as soon as might be, the proceeds to be placed to the credit of S., and any balance, after deducting the sum already found to be due from S. to C., to be paid to S. on demand. Objection was made to the report on account of want of certainty and finality in these latter directions. But the court said it was not necessary to consider these provisions at all. The referees had no authority to make any award, or to give any orders concerning the property. “It is proper, therefore, to consider every thing stated in the report touching this subject, as cautionary on the part of the referees, to prevent the inference, which might have been drawn from the submission of all demands, that the property in the hands of C. had become his.” The proviso was to be regarded as for the benefit of S., to ensure against the report standing in the way of his recovering his property after he had paid his debt. It was solely to prevent disputes. It was not to be construed as an attempt to settle the title in the property, which must be established by other means.<sup>1</sup>

**An Award may be good by Manifest Implication.**—The rule is reasonable and well established that if, by manifest implication, that appear which, if positively expressed, would render the award good, that is sufficient to support it.

A submission was entered into under a contract which stip-

<sup>1</sup> Skillings v. Coolidge, 14 Mass. 43.

ulated for payments by instalments. It was "evident, that the award embraced the entire contract, and directed the payments to be made by instalments corresponding with the contract." But it was objected that the submission authorized the arbitrators to award only as to the first instalment, and since the first payment might, for aught that appeared on the award, be ordered in respect of a later instalment, the award was not divisible, and was void. But the court considered that this was not a reasonable construction or intendment of the award, and refused to vacate it on this ground.<sup>1</sup>

C. and L., copartners, submitted all matters in difference. The award found that C. owed L. \$808.49, "which sum includes the settlement for the T. oxen, and C. is relieved from liability on account of the same, as between the parties." It was objected that the award was not mutual, because it did not in express terms require L. to relieve C. from the partnership debt to T. But the court considered that, upon a fair construction of the award, this requisition would be implied.<sup>2</sup>

A submission was made to arbitrators to determine whether a pew "legally belongs to the estate of M. D., to those who claim under her, or to any of them, or to H.," and stipulated that if the award should be that the pew did belong to the estate of M. D. or to persons inheriting from her, then H. should execute a conveyance of his right, title, and interest therein to S. The arbitrators awarded that the pew "belonged to and was the property of M. D. at the time of her decease," and "therefore" directed that H. should make the stipulated conveyance to S. The award was objected to as not following the submission nor deciding the case submitted. But the court upheld it; for, "by necessary implication" from the order that H. should convey, the arbitrators found the better title to be in the heirs of M. D. Further, the finding that the title was in M. D. at the time of her decease was, "in effect and

<sup>1</sup> *Rixford v. Nye*, 20 Vt. 132.

<sup>2</sup> *Lamphire v. Cowan*, 39 Vt. 420.

by necessary implication, taken in connection with the subject-matter of the controversy and the evidence," a finding that the title remained in her heirs at the time of the award.<sup>1</sup>

**An Award of Costs may be good by Implication.** — Where the submission or reference is of a pending cause, it may be laid down, as a general rule, that an award of costs, without more, will generally be construed as a finding, by implication, of the substantial issues in favor of the party to whom costs are awarded. Thus it has been said in Massachusetts that if the referees to whom is referred a pending cause report only that a party shall recover his costs, this is construed as a finding in favor of that party, upon the merits and the matter in issue.<sup>2</sup>

If a suit in which damages are claimed, is submitted, an award that one party shall "pay all the costs of the suit pending in the court from which the reference had its origin," is, "by necessary implication, a decision that he should recover no damages for his alleged cause of action."<sup>3</sup>

**An Award in too General Language may be restricted.** — It has "been settled that an award, though expressed in such general terms as to include all disputes, may, in its operation, be restricted to the particular disputes submitted." (See *post*, p. 465 *et seq.*) And unless it be expressly shown that the arbitrators have investigated matters not included in the submission, "though their language, from a want of technical precision, may be too general, the presumption is that they performed nothing beyond their duty."<sup>4</sup> In the cited case, a submission was entered into concerning the divisional lines of certain real estate and trespasses alleged to have been committed thereon. The award passed specifically upon these matters, and contained also the general direction that "all actions,

<sup>1</sup> *Spear v. Hooper*, 22 Pick. 144.

<sup>2</sup> *Stickles v. Arnold*, 1 Gray, 418; *Buckland v. Conway*, 16 Mass. 396.

<sup>3</sup> *Sears v. Vincent*, 8 Allen, 507.

<sup>4</sup> *Joy v. Simpson*, 2 N. H. 179; and see *Ward v. Hall*, 9 Dowl. 610, stated *post*, in the chapter on the Divisibility of the Award.

controversies, &c., between the parties, touching the premises," should cease. Upon the strength of the foregoing principles the force of this general language was so far curtailed that the award was construed to be within the scope of the submission.

Even so early as in Rolle's Reports, we find a similar adjudication. Certain suits as to titles were submitted, and the award directed *all* suits to cease. It was held that this order in the award should be construed only of and concerning the suits included in the submission.<sup>1</sup>

P. and A., having claims against each other, reduced them to writing and submitted them to arbitrators. The award was that A. was indebted to P. in the sum of \$33.50, "to balance claims, demands, and accounts between them, and that P. recover \$33.50 balance of accounts." It was objected that this award appeared to give a sum to balance *all* claims, &c., between the parties, whereas only certain specific claims had been submitted. But the court said they must "take it for granted" that the sum awarded was to balance only such claims, &c., as had been submitted, at least until it was affirmatively shown that there were other claims between the parties which had not been reduced to writing and submitted.<sup>2</sup> It will be observed that the proof was here required to extend, not to the fact that other claims had been in fact considered by the arbitrators, but only to the existence of such claims. But the language of the court may have been lax, since the precise point of whether or not the mere existence of claims would suffice to overturn the award was not in issue.

**The Degree of Proof required to prevent such Restriction.**— "The court will not intend that claims not embraced by the submission were in fact considered and decided by the arbitrators merely because the terms of the award are broad enough to cover such claims." The fact may, however, be shown by the party seeking to impeach the award. The sub-

<sup>1</sup> *Ingraham v. Webb*, 1 Rolle's Rep. 362; *Webb v. Ingram*, Cro. Jac. 663.

<sup>2</sup> *Parsons v. Aldrich*, 6 N. H. 264.

mission related to partnership controversies, debts, and accounts. It was objected that certain joint and several notes had been improperly taken into consideration and awarded upon. The Court said that it was impossible, from the mere form of these notes, to say what was the relationship between the parties in respect of them. They *might* have been notes of the firm. And, further, they refused to "presume against the award of the arbitrators that matters which have been laid before them, and have been considered and determined by them as partnership claims, are not matters included in the submission, merely because they are such that they *may* not have been properly included in the award. The party who assails an award must clearly go further than merely to show that the referees may have erred."<sup>1</sup>

**Construction of Awards concerning Boundary Lines.** — Commissioners were appointed to set off a widow's dower in woodlands. Among the boundaries given was the following: "to an oak-tree marked, thence, on the heirs of J. K., to another oak-tree marked." It was contended upon the one hand that the line between these two marked oak-trees must be straight. On the other hand it was contended that the line should be curved. Parol evidence was offered in the lower court to support the latter theory, but was rejected. This ruling was held, upon appeal, to be "in all respects correct." For, "when a line is given in any deed or other instrument of conveyance to be run from one landmark to another, it is a necessary inference that a straight line is to be run from one of the termini to the other, and without regard to the correspondence of either course or distance, unless a different line is described in the deed or instrument of conveyance." The parol evidence which was offered in reference to old monuments was irrelevant, for the reason that these were not referred to in the report. There was no latent ambiguity in the return; it was to "be ascertained by its language, and it would be a danger-

<sup>1</sup> Richardson v. Huggins, 23 N. H. 106.

ous precedent, and in violation of a well-known rule of evidence, to allow it to be varied, explained, or controlled by parol evidence.”<sup>1</sup> This case is explained in the later case of *Clark v. Burt*,<sup>2</sup> as only deciding “that where a boundary line is given in a deed to be run from one given monument to another, it must be deemed to be a straight line, unless a different one is described in the deed [*i. e.*, report]. It is true that, in the case cited, the description was ‘by the line of the heirs of A. B.’ But it is quite apparent that in fact, in that case, there was no such existing line as that stated in the deed [report]. It was only an imaginary line, passing over the land of the heirs of A. B., and, of course, could not be adopted as a controlling boundary, or justify a departure from a straight line between the two points given.”

In this last-cited case the description in the award was “to a stake and stone (described); thence, westerly, by land of said C. to a spruce-tree in the swamp.” The localities of the stake and spruce-tree were not in dispute. In the lower court the award was held void for uncertainty in the description of this line, and this decision was sustained upon appeal. For it was said that if only termini were named, the line must be a straight one between them. But if monuments or other extraneous matters were introduced into the description as part of the boundary, and the line was required to conform to these, then the rule of the straight line must yield; and the phrase “bounded by land of A. B.,” or the like, was the introduction of a controlling monument, or the equivalent thereof.<sup>3</sup>

**Presumption in Awards concerning Boundary Lines.** — It is said that where the arbitrators are to establish the boundary by reference to or in accordance with some original line, it will be presumed that they have followed this instruction in their finding.<sup>4</sup>

<sup>1</sup> *Allen v. Kingsbury*, 16 Pick. 235.

<sup>2</sup> 4 Cush. 396.

<sup>3</sup> See a further statement of this case, *post*, in the chapter on Testimony of the Arbitrator.

<sup>4</sup> *Robertson v. M’Niel*, 12 Wend. 578.



**Explanation of Awards concerning Boundary Lines.**—An award concerning boundary lines may be explained by evidence showing what and where are the metes and lines mentioned in the award.<sup>1</sup>

**Discrepancy between the Submission and Award concerning a Boundary Line.**—A submission to arbitrators to run a boundary line, stipulated that a certain *cedar post* on the river's bank should constitute the starting-point. The award, in describing the line, began at a *stake* in the margin of the river. But the court held that it did not appear that the arbitrators had disregarded the cedar post, and taken an unauthorized point of departure. "There is no averment that the stake is not at the identical place where the cedar post stood when the bond was executed. We cannot intend that the arbitrators commenced running the line at a different place from the one designated. If they did, it was matter of defence, and must be shown by the defendant."<sup>2</sup>

**Requisition that Acts be done interchangeably or contemporaneously.**—Where an award concerning real estate directs each party to execute a release to the other, it will, unless otherwise clearly to be inferred from the language of the award, be presumed that the acts were intended to be concurrent and dependent. Neither party will have a right to demand performance by the other, without performance or simultaneous tender of performance on his own part. The mere order in which the acts are stated in the award will be immaterial.<sup>3</sup>

An award directed A. and B. to execute "forthwith" certain conveyances to C., and ordered C. "forthwith" to execute indemnities and releases to A. and B. This was construed to require C. to give the indemnities and releases immediately upon receiving the conveyances from A. and B., and was there-

<sup>1</sup> Robertson v. M'Niel, 12 Wend. 578; but see Clark v. Burt, in the chapter on Testimony of the Arbitrator.

<sup>2</sup> Bacon v. Wilbur, 1 Cow. 117.

<sup>3</sup> M'Neil v. Magee, 5 Mason, 244 (Story, J.).

fore held to be good. The indemnities were to be executed so soon as the parties to whom they were to run, should put themselves in a condition to ask for them, that is to say, so soon as the contemplated conveyances should be made.<sup>1</sup>

Where one party agreed to release to the other certain land, and the purchaser agreed to pay "therefor" such sum as the arbitrators should determine to be the value of the same, held, that the seller was not bound to tender a deed unconditionally and without payment, but only to be ready to give a deed upon payment. The delivery of the deed and the delivery of the price determined upon by the arbitrators were to be concurrent acts.<sup>2</sup>

**Every Presumption and Intendment will be in Favor of the Validity of the Award.** — Every reasonable presumption and intendment will always be entertained in favor of the validity of the award, as in the case of a judgment.<sup>3</sup> The party seeking to impeach it will therefore have upon himself the burden of proof, in order to destroy these presumptions.<sup>4</sup>

Thus where a suit for trespass to real estate was submitted, the title being in dispute, and the award found that the plaintiff had the better title, and the defendant had "no title which would justify his acts," the court presumed, nothing to the contrary appearing, that the defendant had not sought to justify on the strength of the title of any other person.<sup>5</sup>

A submission was entered into between the parties of "all demands between them," under a statute declaring that only

<sup>1</sup> *Boyes v. Bluck*, 13 C. B. 652.

<sup>2</sup> *Inhabitants of Portland v. Brown*, 43 Maine, 223.

<sup>3</sup> *Strong v. Strong*, 9 Cush. 560; *Tallman v. Tallman*, 5 id. 325; *Hayes v. Forskoll*, 31 Maine, 112; *Lamphire v. Cowan*, 39 Vt. 420; *Kendrick v. Tarbell*, 26 id. 416; *Gonsales v. Deavens*, 2 Yeates, 539; *Parsons v. Aldrich*, 6 N. H. 264; *Fiske v. South Wilbraham Mfg. Co.*, 7 Allen, 476; *Jackson v. Ambler*, 14 Johns. 96; *Rixford v. Nye*, 20 Vt. 132; *Henrickson v. Reinbach*, 33 Ill. 299 (in which case the principle was carried to a great length; see full statement in the chapter on Certainty); *Case v. Ferris*, 2 Hill, 75. See *Robertson v. M'Niel*, 12 Wend. 578, stated *ante*, pp. 444, 445.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Thoreau v. Pallies*, 5 Allen, 354.

such demands could be submitted "as might be the subject of a personal action at law, or of a suit in equity." The award was simply that the plaintiff should recover a certain sum, and that "the same should be in full of all matters referred to us." The presumption being in favor of the award, it was upheld as good, against the objection that it did not appear that all the matters included in the decision "were the subject of personal actions at law or suits in equity."<sup>1</sup>

An award ordered J. D. to assign to S. G. certain bonds, given by M. G. to J. V. The assignment was to be to the use of said S. G., and made at his "own proper risk and costs." The award was objected to because it did not appear that J. D. had any title or interest in or to these bonds, to which he was, nominally at least, no party. But the court, refusing to presume any thing against the award, said that it was sufficient, if they could not actually and affirmatively collect from the award itself that J. D. had in fact no claim whatever to the bonds which he was directed to assign. This did not appear upon the face of the instrument, and apparently no proof was even offered to show it, and the award was sustained.<sup>2</sup>

**The Presumption is that the Arbitrators have followed the Submission.** — The general presumption always is that referees have decided all which they ought to have decided, and that they have not considered nor included in their award any thing which it was not within the scope of their authority and duty to decide.<sup>3</sup>

So also it has been declared in Massachusetts that it will always be presumed in the first instance, unless the award itself contradicts the presumption, that the arbitrators have decided all which it was their duty to decide. A party seeking to impeach the award on the ground that they have not

<sup>1</sup> *Fiske v. South Wilbraham Manufacturing Company*, 7 Allen, 476.

<sup>2</sup> *Gonsales v. Deavens*, 2 Yeates, 539.

<sup>3</sup> *Chapin v. Boody*, 25 N. H. 285; *Joy v. Simpson*, 2 id. 179; *Parsons v. Aldrich*, 6 id. 264.

done so, will be obliged affirmatively to prove the omission or neglect.<sup>1</sup>

**Limit to the Rule of Favorable Presumption.**—There is, of course, a limit to the extent to which favorable presumptions can be indulged. An award must be construed reasonably, and not in contravention of its obvious meaning; nor should that meaning be forced. An award specified several debts as being due by the parties jointly, and also found that “all outstanding debts for cattle, if any such, are joint.” It was held that it was impossible to construe the specific debts named as including all the debts due for cattle; also that it was impossible to assume that there were no outstanding debts due for cattle, simply because none had been specifically found. The court, being unable to go to this length, held the award void.<sup>2</sup>

**Construction of a Reservation of a Question for the Court.**—If referees in their report reserve a question to be determined by the court, the extent of the reservation will be narrowly and precisely construed. Thus where referees awarded that, if the court should be of opinion that a certain act was a fraud which would avoid a sale, they found in favor of one party, otherwise they found in favor of the other party; the court held that the matter referred to them was only whether or not the act was *per se* fraudulent, *i. e.*, whether such an act was fraud as matter of law; that if it was only evidence of fraud, no matter how strong, they could not declare it to be fraudulent.<sup>3</sup>

**Effect of Inconsistency in an Award.**—An award must be consistent. If it be not so, it is not, strictly speaking, possible. Yet the existence of contradiction or repugnancy between different parts of the instrument will not always avoid it. The wish of the courts, in modern times, is to construe the award so that it can stand as a determination of the matter in dispute;

<sup>1</sup> Strong v. Strong, 9 Cush. 560; Tallman v. Tallman, 5 id. 325.

<sup>2</sup> Patton v. Baird, 7 Ired. Eq. 255.

<sup>3</sup> Gould v. Ward, 4 Pick. 104.

and they will seek this consummation by any means reasonably open to them in the case.<sup>1</sup>

Thus where several actions had been referred, the award was that the actions should cease ; and also that in one of them, an ejectment suit, judgment should be entered. The court avoided the necessity of construing the award to be inconsistent by reading the two directions together, and holding the intention of the award to be that the suit in ejectment was to cease unless the defendant gave up the premises by a certain day ; but that in event of such failure upon his part, judgment should be entered up and execution taken out.<sup>2</sup>

The old rule was, that if there was a contradiction or inconsistency between two parts so that both could not stand, the former should stand and the latter be rejected. But if the latter was intended only as an explanation of the former, then both should be sustained.<sup>3</sup> Though how things contradictory can be regarded as explanatory of each other, it is somewhat difficult to conceive ; and still more difficult to see how two inconsistent orders could each be enforced. And accordingly the English rule now is, as stated by Mr. Russell, that "where the award is manifestly inconsistent and repugnant, the court will set it aside." But the rule that if the award is capable of being sustained, the first part shall prevail and the latter be rejected, has been also asserted in New York.<sup>4</sup>

A suit was based on an alleged fraudulent representation by the defendant concerning A.'s circumstances. In his award, the arbitrator found that the defendant had not given a fair representation, and had omitted to state material facts ; also that the defendant was not guilty of fraud in so misrepresenting and neglecting to state all that he should have stated.

<sup>1</sup> Russell on Arb., p. 289 ; *In re Templeman v. Reed*, 9 Dowl. 962 ; *Stonehewer v. Farrar*, 9 Jur. 203.

<sup>2</sup> *Jones v. Powell*, 6 Dowl. 483.

<sup>3</sup> *Perry v. Berry*, 3 Bulstr. 62 ; and see *Sherry v. Richardson*, Pop. 15.

<sup>4</sup> *Cox v. Jagger*, 2 Cow. 638 ; stated at length, *post*, in the chapter on Divisibility of the Award.

Yet the arbitrator said that he felt bound by the adjudications in the reports to find that knowledge of the falsehood was fraud and deceit. Wherefore he awarded in favor of the plaintiff. The court held that his view of the law was wrong, and declared the award void. Parke, J., said: "The conclusion to which the arbitrator has come in this case is quite absurd. He says, 'I think he is innocent,' and then awards against him."<sup>1</sup>

**Favorable Construction of apparently Inconsistent Findings.**— Russell says: "The necessity of finding on each issue has sometimes exposed the arbitrator to a charge of making an inconsistent award, but the two following cases will free him from any ungrounded apprehension on that score."

The cases referred to are these: Suit was brought on an agreement. The defendant pleaded: 1. Denial of the agreement; 2. Denial of the breach; 3. He admitted the agreement, but alleged its rescission before breach; 4. That it was varied by consent. Other pleas were also set up by him. The award was of a general verdict to be entered for the defendant. The court regarded this as equivalent to finding for the defendant on each issue, and held that such a finding in his favor, though upon inconsistent pleas, did not render the award inconsistent, since it was possible that had the cause been tried at *Nisi Prius* the circumstances might have warranted such a finding.<sup>2</sup>

In debt, where the defendant's pleas are *nunquam indebitatus* and payment, the award may consistently be for the defendant upon both, since, if at a trial of the case the plaintiff should fail to prove his case and the defendant should prove payment, the verdict would be entered for the defendant on both issues.<sup>3</sup>

In suit in assumpsit on a retainer to project certain works, and to examine certain bills with care, the defendant pleaded: 1. *Non assumpsit*; 2. No retainer; 3. Use of due care in pro-

<sup>1</sup> *Ames v. Milward*, 8 Taunt. 637.

<sup>2</sup> *Cooper v. Langdon*, 9 Mee. & W. 60, and 1 Dowl. n. s. 392.

<sup>3</sup> *Maloney v. Stockley*, 4 Man. & Gr. 647.

jecting ; 4. Use of due care in examining the bills. The award found for the defendant on the first, second, and fourth issues, and for the plaintiff on the third. This was held good and not repugnant, for that the finding on the third and fourth issues must be regarded as hypothetical, and made only in order to determine the costs upon them.<sup>1</sup>

Plaintiff declared in case, alleging that he was entitled to the reversion in a close, and that one H. had wrongfully and injuriously erected encumbrances thereon, and that the defendant had wrongfully and injuriously continued said encumbrances. Pleas : 1. Not guilty ; 2. That H. did not erect the encumbrances on the close. The award ordered a verdict for the plaintiff on the first plea, and for the defendant on the second. It was held not inconsistent, since the first plea put in issue only the continuance of the encumbrance by the defendant, and not its erection by H.<sup>2</sup>

**Explanations by the Arbitrator.**—The subject of how far statements, affidavits, or testimony of an arbitrator may be availed of to aid in the construction of the award is discussed in the chapter on Testimony of the Arbitrator.

<sup>1</sup> *Duke of Beaufort v. Welch*, 10 Ad. & El. 527.

<sup>2</sup> *Grenfell v. Edgcome*, 7 Q. B. 661.

## CHAPTER XVII.

### DIVISIBILITY OF THE AWARD ; AWARD GOOD IN PART, BAD IN PART.

An award good in part and bad in part may often be separated.

Whether the good part need decide all the matters submitted.

An award may be separable in respect of matters all ordered to be done by the same party.

An old English rule.

Cases illustrative of the old rule.

The modern rule.

Cases illustrative of the modern rule.

Elimination of orders in excess of the arbitrator's authority.

Separation where the excess constitutes a portion of a consideration or condition precedent.

Excess in awarding costs is generally separable.

Excess in an order concerning a specific sum.

Excess by establishing a condition precedent may be separable.

Excess in award directing a payment.

Excess in orders for the execution of releases.

Excess in directions for the future conduct of the parties.

Excess in awards concerning real estate and boundaries.

Excess by orders made in respect of strangers to the submission.

Excess by ordering a verdict or a judgment.

If the court cannot distinguish the excess, the whole award is bad.

Excess by not following the submission.

Excess by reserving further powers or duties.

Separation will not be allowed if the decision of the principal point in dispute is to be rejected.

Award of a gross amount, covering matters not within the arbitrator's authority.

Separation of an award finding a gross sum may sometimes be made.

The presumptions will be favorable to separation.

The desire of the courts is to make the separation.

Separation in cases of an uncertainty in part of the award.

Separation may sometimes be effected where the party losing thereby will waive his advantage or objection based on the bad part.

An award in the alternative may be separated.

Effect of an offer to perform an inoperative order.

Effect of separation on directions concerning fees.

The court may hold a separable award under advisement.

Suits instituted upon separable awards.



**An Award good in Part and bad in Part may often be separated.**

— Since the days of King James the First<sup>1</sup> the characteristic of divisibility has been recognized as inherent in the award under certain circumstances. An award may often be good in part and bad in part. In such an event, if the good portion be complete in itself, and be wholly separable from and independent of the bad part, it may be sustained. The bad part will be rejected.<sup>2</sup> It will not be actually stricken out, but it will be simply set aside and disregarded.<sup>3</sup>

This doctrine, however, will never be applicable if there be any connection or interdependence between the good and the bad parts. If any injustice would be effected by allowing a portion to stand and rejecting the rest, the separation will not be permitted. It should be obvious from the award, the submission, and the attendant circumstances, that the arbitrators would not have altered their finding in the good part, had they known that the remainder would be inoperative or unenforceable. If the good part is based upon the bad as a condition precedent, or as a consideration, either in part or in whole, the entire award will be void. If the nullity of the bad part deprives a party of a benefit which it was intended that he should have, by way of exchange or equivalent, in full or in part, for matters awarded against him in the good portion of the award, then this residue, at least as *against* him, will not be capable of enforcement, since he will not reap from the award the advantage which the arbitrators desired to have him take. If the foundation of the good part fails even partially, the avoidance

<sup>1</sup> Prior to that time, says Chief Justice Holt, the rule was inflexible that if the award was bad in any part, it was void altogether. *Furlong v. Thornigold*, 12 Mod. 533.

<sup>2</sup> *Orcutt v. Butler*, 42 Maine, 83; *Clement v. Durgin*, 1 Greenl. 300; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125; *Shearer v. Handy*, 22 Pick. 417; *Chase v. Strain*, 15 N. H. 535; *Parmelee v. Allen*, 32 Conn. 115; *Cohen v. Habenicht*, 14 Richardson, Eq. (So. Car.) 31; *Stone v. Phillips*, 4 Bing. N. C. 37; *Cromwell v. Owings*, 6 Har. & J. 10; *Caton v. McTavish*, 10 Gill & J. 193.

<sup>3</sup> *Woglam v. Burnes*, 1 Binney, 109.

of the whole instrument is inevitable.<sup>1</sup> Such is the general rule, though certain exceptions to its operation in peculiar cases will be noted hereafter in this chapter, especially in the paragraphs entitled "Separation where the Excess constitutes a Portion of a Consideration or Condition Precedent," and "Excess by establishing a Condition Precedent" may be separable.

**Whether the Good Part need decide all the Matters submitted.**—It is said by Russell, that "if, notwithstanding some portion of the award is clearly void, the remaining part contain a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected."<sup>2</sup> But it appears that the conditional requisition herein embodied, viz., that "every question submitted" should be determined, is operative only where the submission is itself inseparable, as, for example, where it contains the *ita quod* clause or an equivalent thereof. In *Stone v. Phillips*, which Mr. Russell cites as his authority, an action of ejectment included in the submission was not decided; and Chief Justice Tindal said, "I cannot say that the award is good, *when the condition of the submission is that the arbitrator shall award on the premises referred to him.*" So, in *Auriol v. Smith*,<sup>3</sup> it was said that an award might be "good in part and bad in part, where *the submission* was clearly capable of being separated."

<sup>1</sup> *Commonwealth v. Pejepsut Proprietors*, 7 Mass. 399, at p. 420; *Clement v. Durgin*, 31 Greenl. 300; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 417; *Chase v. Strain*, 15 N. H. 535; *Parmelee v. Allen*, 32 Conn. 115; *In re Tandy v. Tandy*, 9 Dowl. 1044; *Auriol v. Smith*, 1 Turn. & R. 121; *Watkins v. Philpotts*, M'Lel. & Y. 893; *Nickels v. Hancock*, 7 De G., M. & G. 300; *Candler v. Fuller*, Willes, 62; *Stork v. De Smeth*, ib. 66; *Bowes v. Fernie*, 4 M. & C. 150; *Bacon's Abr. Arb.*, E. 3; *Rolle's Abr. Arb.*, K. 8, p. 253; *Com. Dig. Arb.*, E. 14; *Winch v. Saunders*, Cro. Jac. 584; *Pope v. Brett* (notes), 2 Saunders, 293 b; *Thinne v. Rigby*, Cro. Jac. 314; *Barney v. Fairchild*, *Rolle's Abr. Arb.*, N. 9, p. 259; *Hawkyard v. Stocks*, 2 Dowl. & Low. 936; Russell on Award, Part II., chap. 5, § 9 (p. 321), citing the preceding authorities. Nearly all of these cases will be found stated at length in the subsequent portions of this chapter.

<sup>2</sup> Russell on Arb., 3d ed. p. 312, citing, by way of authority, *Stone v. Phillips*, 4 Bing. N. C. 37.

<sup>3</sup> 1 Turn. & R. 128.

The principle has been laid down in the above shape by the court in Maine, where it has been held that if the submission, either in terms or by implication, contains the *ita quod* clause, so that the validity of the award is expressly made conditional upon the decision of all the matters submitted, and the nullification of the bad part would prevent the award from making the entire disposition intended, then the whole award must fail.<sup>1</sup>

Several cases, stated in this chapter, will be noticed wherein an award, good only as to a portion of several distinct matters submitted, has been upheld as valid in respect of these.<sup>2</sup>

**An Award may be separable in Respect of Matters all ordered to be done by the Same Party.** — It is obvious that where several orders are given, all to be performed by one person, and of these some are good and some are bad, this person can lose nothing by being relieved from performance of the bad part. He cannot thereby be deprived of any equivalent or recompense. Wherefore, the general rule has been laid down to the effect that “if the *same party* is required to do several things, and, as to some of them, the award is bad on the ground of uncertainty or because the arbitrators have exceeded their powers, this can furnish no good reason for holding the party discharged as to those things which are well awarded.” It can only be “where the good and the bad relate to different parties, and the void part of the award is the consideration or recompense of the thing awarded on the other side,” that the whole award must fail.<sup>3</sup>

**An Old English Rule.** — A rule to be gathered from many of the old English cases, but which can no longer be considered

<sup>1</sup> McNear v. Bailey, 18 Maine, 251.

<sup>2</sup> See, for example, Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. 125; Gordon v. Tucker, 6 Maine, 247, at p. 255; Giddings v. Hadaway, 28 Vt. 342; Bacon v. Wilber, 1 Cow. 117.

<sup>3</sup> Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. 125 (*per* Bronson, J.). Language to the same purport is used in Gordon v. Tucker, 6 Maine, 247, at p. 255.

to be in force, as is clearly shown by the cases stated in this chapter, was substantially that awards were to be sustained, whatever portions were stricken out as being bad, provided that after the excision there still remained something awarded upon each side, so that the technical rule of mutuality was satisfied, even though the award itself was so far modified that it became "a very different measure of reciprocity from that which the arbitrator intended."<sup>1</sup>

**Cases Illustrative of the Old Rule.** — The following case furnishes an example of the unjust operation of the old rule. The arbitrator awarded that the defendant should execute a bond, with two sureties, for the payment of a certain sum of money to the plaintiff, and that thereupon the plaintiff should execute a release. The direction concerning the sureties was bad. But the Court held that it was separable; that the defendant should give his personal bond only, and that thereupon the plaintiff would be bound to execute and deliver the release.<sup>2</sup> The gross injustice of this reduction of the plaintiff's security shows conclusively the unsoundness of the rule under which the Court acted.

**The Modern Rule.** — But this doctrine has long since been abandoned, in favor of a rule which is, as Russell says, "more consonant to the principles of justice." The modern principle is that "if, by the nullity of the award in any part, one of the parties cannot have the benefit intended him as a recompense or consideration for that which he is to do to the other, the award will usually be treated as void in the whole."<sup>3</sup>

<sup>1</sup> Russell on Arb., 3d ed. pp. 320, 321; citing *Joyce v. Haines*, Hard. 399; *Harris v. Knipe*, 1 Lev. 58; *Bargrave v. Atkins*, 3 Lev. 413; *Lindsey v. Aston*, 2 Bulst. 38; *Lee v. Elkins*, 12 Mod. 585; *Osborn's Case*, 10 Rep. 129 b; *Bedell v. Moore*, cited 10 Rep. 131 b.

<sup>2</sup> *Thursby v. Helbert*, Carth. 159; 1 Show. 82; 3 Mod. 272; and see *Norwich v. Norwich*, 3 Leon. 62; *Furlong v. Thornigold*, 12 Mod. 533; *Cooke v. Thorwood*, 2 Saund. 337; also Russell on Arb., 3d ed. p. 321.

<sup>3</sup> Russell on Arb., 3d ed. p. 321; citing *Bac. Abr. Arb.*, E. 3; *Rolle's Abr. Arb.*, K. 8, p. 253; *Com. Dig. Arb.*, E. 14; *Winch v. Saunders*, Cro. Jac. 584; and see notes to *Pope v. Brett*, 2 Saund. 293 b.

**Cases Illustrative of the Modern Rule.** — A few cases may be selected for the express purpose of showing the working of the modern doctrine, though it will be observed that in nearly all the cases stated in this chapter, in which the circumstances gave room for its operation, it has been applied. An award ordered one party to pay the money due for task-work, but specified no sum; directed the other party to pay twenty-five pounds, and added that both should give general releases. The direction concerning the task-work was void for uncertainty; and it was held that it operated to avoid the whole award, since the payment for this work, as well as the general release, was intended as a recompense for the payment of twenty-five pounds by the other party.<sup>1</sup>

An award ordered a sum of money to be paid to A., upon A., his wife and son executing a conveyance of an estate. The wife and son were not parties to the submission, and consequently the award could not be enforced against them. This order being void, the whole award was therefore held void, since the party who was to receive the property could not enforce the conveyance for which his money was to be paid.<sup>2</sup>

An award ordered that the defendant should have certain trees, and should give security to the plaintiff for payment of a certain sum named. The latter direction being bad for uncertainty, the whole award was held bad.<sup>3</sup>

It was stipulated that the costs of the cause referred should abide the event of the arbitration. The arbitrator, though having no authority to do so, directed that a verdict should be entered. The court set the award aside altogether. For it was said that if the direction for the entry of the verdict were stricken out, there would be left no such determination of the cause in favor of the defendant as would enable him to recover his costs.<sup>4</sup>

<sup>1</sup> Pope v. Brett, 2 Saund. 293 b; Com. Dig. Arb., E. 14.

<sup>2</sup> Barney v. Fairchild, Rolle's Abr. Arb., N. 9, p. 259.

<sup>3</sup> Bac. Abr. Arb., E. 3; Thinne v. Rigby, Cro. Jac. 314.

<sup>4</sup> Hawkyard v. Stocks, 2 Dowl. & Low. 936.

It appeared concerning the subject-matter of the submission that the titles to certain lands had been passed to a party as collateral security for a loan made by him. The award provided for repayment of the loan and a reconveyance of the land. So far as related to the reconveyance of the land, it was void for uncertainty. It was held that there was such a connection between the two parts that there could be no separation of the one from the other. "The arbitrators never could have designed that [the lender] should get his money and retain his deposits."<sup>1</sup>

A dispute concerning a boundary line led to a personal conflict. A submission was entered into "of all disputes and quarrels or differences that now exist respecting the establishing the line or partition fence," and of all other disputes. A verbal award was made. The portion of it relating to the title to the real estate was therefore null, and the court held that the portion relating to the personal injury could not be separated and sustained, "because one or the other of the parties might be more or less in the wrong, according to the decision which should be made respecting the title to the real estate."<sup>2</sup>

**Elimination of Orders in Excess of the Arbitrator's Authority.**— Perhaps the most numerous class of cases in which the doctrine of divisibility is allowed to operate, is furnished by awards wherein the arbitrator has exceeded the scope of his authority. If the matter in excess be properly separable, according to the general principle hereinbefore laid down, it will be lopped off, and the remainder of the award will be upheld. Such an excess, if it form no basis, consideration, recompense, or equivalent for any of the orders of the award made in respect of matters within the arbitrator's authority, will be mere surplusage.<sup>3</sup> If, however, the contrary be the

<sup>1</sup> *Lyle v. Rodgers*, 5 Wheat. 394. See *Giddings v. Hadaway*, 28 Vt. 342, *post*, pp. 466, 467.

<sup>2</sup> *Philbrick v. Preble*, 18 Maine, 255.

<sup>3</sup> *Gilmore v. Hubbard*, 12 Cush. 220; *Griffin v. Hadley*, 8 Jones, Law, 82;

case, and if there be any interdependence or connection between the portion of the award which is within, and that which is without, the arbitrator's authority, so that it appears that his determination in the good part has been at all affected by his determination in the bad part, then, of course, the separation becomes impossible, and the whole award will fall.<sup>1</sup>

Thus it was said by Judge Bigelow: "It is now the well-settled rule, that if the thing awarded to be done, which is bad as being beyond the submission, forms no part of the consideration for or element in the performance of that part which is good as being within the submission, but is wholly distinct and independent thereof, then the award can be separated, and the bad part rejected, and that which is good held valid and binding upon the parties." The facts to which this doctrine was applied were as follows: The arbitrators were to award concerning the claims of each partner upon the firm, of each of them upon the other, and of the firm upon each of them. In "full settlement and adjustment" of those matters the arbitrators ordered certain sums to be paid by the partners between themselves. But in another clause they also provided for the manner of paying outstanding partnership debts and collecting outstanding partnership dues. This latter clause, clearly bad as being in excess of authority, was set aside because it was "a separate, independent matter, which could not affect the accounts of the partners between themselves, or between them and the firm; nor could it properly enter into and form part of the consideration upon which the award of the sums due [between the partners] was based. . . . In these particulars the award,

*Tracy v. Herrick*, 25 N. H. 381; *Chase v. Strain*, 15 id. 535; *Smith v. Sweeny*, 35 N. Y. 291; *Martin v. Williams*, 13 Johns. 264; *Jackson v. Ambler*, 14 id. 96; *McBride v. Hagan*, 1 Wend. 326; *Harrison v. Lay*, C. P., 12 Feb. 1863, N. R. 437; also cases cited in the further discussion of this subject.

<sup>1</sup> *Sawyer v. Freeman*, 35 Maine, 542; *Marshall v. Dresser*, 3 Q. B. 878; *Russell on Arb.*, 3d ed. p. 322.

*prima facie*, would have been the same whether the outstanding debts due to and from the firm were taken into consideration or not.”<sup>1</sup>

A submission was made of all demands and controversies between the parties; and a bond was executed binding B. to abide by the decision, and to pay to O. all sums of money that should be awarded against him. The award found that O. should recover from B. a certain sum, should have the privilege of taking certain crops from B.'s land, and should pay the costs of reference; and concluded by providing that “the conveyance heretofore made by said O. to S. W. is to be valid, the consideration for the same having been allowed to said B.” This provision was objected to as vague and indefinite; but the action being only of debt on the bond, to recover the sum found in O.'s favor, the court held that the validity or invalidity of this final clause was immaterial, since the amount allowed in damages did not relate to the W. conveyance, and was obviously separated from it.<sup>2</sup>

Three persons, copartners, entered into a contract with a corporation to do certain work for it. When the work was finished, a dispute arose between the partners as to the terms of division and settlement between themselves. These they agreed to submit to arbitrators. The award apportioned the money, which was to come from the corporation, giving a certain specified sum to each of the three disputants, and further awarded that a certain one of them “being more familiar with the liabilities of the firm, should draw the balance due from the corporation and pay the same to the partners.” The court held that even if this final direction were in excess of the arbitrators' authority (which they did not think it was), nevertheless it was separable, and could be rejected without vitiating the rest of the award.<sup>3</sup>

Arbitrators awarded, among other things, that an action

<sup>1</sup> Barrows v. Capen, 11 Cush. 37.

<sup>2</sup> Orcutt v. Butler, 42 Maine, 83.

<sup>3</sup> Tracy v. Herrick, 25 N. H. 381, at p. 401.



should cease; that the defendant should pay the plaintiff fifty pounds towards the costs incurred in the cause and reference; that the plaintiff should pay his own costs of the cause and reference, and should also pay to the defendant the costs of the defendant in the cause and reference, the said costs to be taxed as between attorney and client. This latter direction, viz., that the costs should be taxed as between attorney and client, was in excess of the arbitrator's authority and void. The court held that they could not separate it from the rest of the award; that it was so connected with the benefit which it was intended that the defendant should derive from the award that an elimination could not properly be made.<sup>1</sup>

An arbitrator ordered that the plaintiff should pay to the defendant a certain sum of money, as the balance of the general account; and also a certain other sum, which was stated by the award to be due to the defendant on account of an illegal insurance partnership transaction between him and the plaintiff. The latter order was held bad, but the remainder of the award was sustained.<sup>2</sup>

If a submission be of certain particular causes pending, and there be also other suits in litigation between the same parties, an award ordering all suits between them to cease will be held good and operative as to those within the submission, and void as to those not within it.<sup>3</sup>

**Separation where the Excess constitutes a Portion of a Consideration or Condition Precedent.**—If the part of the award which is in excess of the authority of the arbitrator forms a portion only of certain acts ordered to be done by a party, upon the performance of all which the other party is to do some specified act, the separation may sometimes be made where equity will allow. In such case the last-named party will be obliged to fulfil the requirements placed upon him after the other has

<sup>1</sup> *Seckham v. Babb*, 8 Dowl. 167; 6 Mee. & W. 129.

<sup>2</sup> *Aubert v. Maze*, 2 Bos. & Pul. 371.

<sup>3</sup> *Webb v. Ingram*, Cro. Jac. 663; and see *Joy v. Simpson*, 2 N. H. 179, stated in the chapter on Rules of Construction, *ante*, p. 441.

performed such of the orders of the award as are held binding. The following cases will show under what circumstances this principle has been allowed to operate.

Where the performance of a specified act, as, for example, the execution of mutual releases, is awarded only conditionally upon the prior payment of certain sums of money and certain costs, and the award, so far as respects the payment of costs, is bad, the separation will nevertheless be carried to the point of eliminating the bad part and requiring the releases to be given after the payment only of the sums of money has been made.<sup>1</sup>

This precedent was also followed where the arbitrator had ordered that a release should be executed after payment of a certain sum named for the debt due and a certain other sum named as the amount of the plaintiff's costs. The costs were, in effect, to abide the event, and it was objected that the arbitrator had exceeded his power in ascertaining their amount. But Coleridge, J., said that the principle of divisibility must be allowed to intervene, and the defendant would probably entitle himself to demand the release by paying the amount of the debt and of the costs regularly taxed.<sup>2</sup>

But as cases are easily conceivable where a separation of this description would deprive the party who was to execute the release or discharge of a material portion of the compensation therefor, which he had not only under the award but also upon the merits of the case a right to expect, so it is obvious that the division would not be made except where the circumstances rendered it equitable, and robbed neither party of any just advantage. Thus the case of *Thursby v. Helbert*,<sup>3</sup> where the separation was allowed under the old English rule, has been already said to be no longer properly an authority.

**Excess in awarding Costs is generally separable.**—Instances in

<sup>1</sup> *Aitchison v. Cargey*, 2 Bing. 199.

<sup>2</sup> *Kendrick v. Davies*, 5 Dowl. 693.

<sup>3</sup> Carth. 159; 1 Show. 82; 3 Mod. 272. See this case stated *ante*, p. 456, and the comments made thereon in that and the following paragraphs.

which arbitrators have gone beyond their authority in ordering payment of costs by a party are of very frequent occurrence. A multitude of cases satisfactorily establish the general rule to be, that if arbitrators, not authorized to award concerning costs, nevertheless undertake to do so, this portion of the award may be rejected and the remainder sustained.<sup>1</sup> So, if the portion of their award concerning costs is void for uncertainty, it may be rejected and the rest sustained, if the party in whose favor the uncertain order for costs would operate is desirous of having the award accepted in spite of the uncertainty. The judgment on such an award will be without costs, unless upon motion the award be recommitted for amendment in the matter of costs alone.<sup>2</sup> If the amount of costs is specifically stated, or directions are given by which it can be ascertained, it will be rejected. If it is specifically stated, and is also included in the gross sum, it will be deducted from that sum.<sup>3</sup>

If the submission specifically embodies provisions for the payment of costs, and the arbitrators nevertheless award concerning them, this portion of their award will be set aside as surplusage, and will not invalidate the remainder.<sup>4</sup>

It may, however, sometimes happen that the direction that the costs shall be borne by one or the other party will be made in such shape that it is evidently not separable. An instance

<sup>1</sup> Russell on Arb., 3d ed. p. 312; *Gordon v. Tucker*, 6 Greenl. 247; *Walker v. Merrill*, 13 Maine, 173; *Tyler v. Dyer*, ib. 41; *Day v. Hooper*, 51 id. 178; *Hanson v. Webber*, 40 id. 194; *Shirley v. Shattuck*, 4 Cush. 470; *Maynard v. Frederick*, 7 Cush. 247; *Caldwell v. Dickinson*, 13 Gray, 365; *Rixford v. Nye*, 20 Vt. 132; *Doke v. James*, 4 Comst. 567; *Hubbell v. Bissell*, 2 Allen, 196; *Candler v. Fuller*, Willes, 62; *Aitcheson v. Cargey*, 2 Bing. 199; *Whitehead v. Firth*, 12 East, 166; *Strutt v. Rogers*, 7 Taunt. 212; *Boodle v. Davies*, 3 Ad. & El. 200; *Barker v. Tibson*, 2 W. Bl. 953; *Cockburn v. Newton*, 9 Dowl. 676; *Marder v. Cox*, Cow. 127; *Firth v. Robinson*, 1 Barn. & Cr. 277; *Rees v. Waters*, 16 Mee. & W. 263.

<sup>2</sup> *Inhabitants of Leominster v. Worcester R.R. Co.*, 7 Allen, 38.

<sup>3</sup> *Shirley v. Shattuck*, 4 Cush. 470.

<sup>4</sup> *Cox v. Jagger*, 2 Cow. 638.

of this kind is furnished by the case of *Seckham v. Babb*,<sup>1</sup> stated *ante*, pp. 460, 461.

**Excess in an Order concerning a Specific Sum.** — Where the arbitrator has considered a special matter which is beyond his authority, and has awarded in respect of it distinctly, as by naming a payment to be made in consideration of it, by itself, the award must generally be divisible. An award found a specific sum as being the value of the labor of a party, another specific sum as interest thereon, a third specific sum as costs. In the two last matters, the arbitrator exceeded the scope of his authority. The award in these respects was set aside, and the remaining direction was sustained.<sup>2</sup>

**Excess by establishing a Condition Precedent may be separable.** — If the arbitrators have no authority to establish a condition precedent, but nevertheless order a payment to be made only upon a condition, the condition will be void, and the sum recoverable without its performance.<sup>3</sup> This cause was twice afterward heard, upon appeals;<sup>4</sup> but I do not find that this ruling was either repeated or reversed. It can hardly take the place of a general principle, at least upon its intrinsic merits; for it would often work obvious injustice.

**Excess in Award directing a Payment.** — If an arbitrator, appointed to determine the purchase-money to be paid for an estate, in addition to naming the price exceeds his authority by also naming a day future for its payment, no separation can be made so as to uphold the award as being good in the matter of the price, and rejecting the item of time. For it is impossible to say that the arbitrator, in naming the amount, was not influenced by his intention of making it payable in the future.<sup>5</sup>

<sup>1</sup> 8 Dowl. 167; 6 Mee. & W. 129.

<sup>2</sup> *Chase v. Strain*, 15 N. H. 535. A like case is that of *Banks v. Adams*, 23 Maine, 259.

<sup>3</sup> *Mayor, &c., of New York v. Butler*, 1 Barb. 325.

<sup>4</sup> 1 Hill, 489; 7 Hill, 329.

<sup>5</sup> *Emery v. Wase*, 8 Ves. Jr. 504 *a*.

**Excess in Orders for the Execution of Releases.**—In England it has frequently occurred that where the power of the arbitrators was confined to certain specified matters, they have nevertheless awarded that general releases of all claims should be executed and exchanged between the parties. So, having power only over controversies up to the date of the submission, they have sometimes ordered releases of all matters up to the date of the award. In such cases the controlling current of authority seems to be in favor of holding the award good so far as to compel the parties to execute releases as to the particular matters, or the matters arising up to the date of the submission, and in reference to which the arbitrators had power to make such an order, but void for the purpose of requiring any more general release.<sup>1</sup>

Cases of this description have been rare in the United States ; but in New York it has been held that if the submission is to be construed as relating only to a single matter, an award which calls, in general terms, for “a release,” will be considered to require a release only in the matter submitted.<sup>2</sup>

**Excess in Directions for the Future Conduct of the Parties.**—Where an arbitrator, after having decided the substantial matters in controversy, proceeds, beyond the scope of his authority, to give orders or directions concerning matters to be done in the future, this excess will, in most cases, be of a separable nature. An arbitrator was authorized to decide upon the method to be adopted for draining certain lands. Embodied in his decision was an order for the erection of certain works, and he proceeded to give directions concerning future repairs of these works. The matter of repairs being beyond the

<sup>1</sup> *Doe d. Williams v. Richardson*, 8 Taunt. 697 ; *Lee v. Elkins*, 12 Mod. 585 ; *Squire v. Grevett*, 2 Ld. Raym. 961 ; *Hill v. Thorn*, 2 Mod. 309 ; *Abrahat v. Brandon*, 10 id. 201 ; *Anon.* 12 id. 8 ; *Hooper v. Pierce*, ib. 116 ; *Russell on Arb.*, Part II., chap. 5, § 9. But see, to the contrary effect, *Vanlore v. Tribb*, *Rolle's Abr. Arb.*, N. 1, p. 258 ; s. c. 1 *Rolle's Rep.* 437 ; *Pickering v. Watson*, 2 W. Bl. 1118.

<sup>2</sup> *Munro v. Alaire*, 2 Caines, 320.

scope of his authority, but his orders in that respect being clearly separable, the rest of the award was sustained.<sup>1</sup>

An arbitrator was empowered to regulate the use of a stream of water flowing through certain ponds. This he did satisfactorily, but added a provision which was to take effect in the event of the ponds at any time being filled up. The court were inclined to regard this provisional order as being in excess of his authority, but refused to allow it to vitiate the award, inasmuch as it was obviously separable.<sup>2</sup>

**Excess in Awards concerning Real Estate and Boundaries.** — Arbitrators were authorized to run boundary lines, and settle title to lands included in a certain patent. It was held that if they ran lines and undertook to settle titles in respect of land not within this patent, such portion of their award would be properly separable, and would not affect the validity of the residue.<sup>3</sup>

An action of trespass *quare clausum fregit* was submitted by agreement before any pleadings had been filed. The award was of "the lands in dispute in favor of the defendant, and the division as it now stands to be the established line." Held, that this award could have no effect upon the title or the boundaries of the land, but might operate as conclusive that the plaintiff had no cause of action. The matters of title and of boundaries were not within the scope of the submission or of the arbitrators' authority.<sup>4</sup>

An award, undertaking to settle a disputed boundary line and a claim of damages for trespass on the same land, may be void for uncertainty as to the boundary, and yet hold good as to the damages, and this, too, although the *locus* of the trespass was the very land over which the boundary ran, and consequently the title of which was in dispute. The court were of opinion that the suit for damages had "no necessary connection with settling the disputed boundary." The

<sup>1</sup> Johnston v. Cheape, 5 Dow (Parl. Ca.), 247.

<sup>2</sup> Winter v. Lethbridge, 13 Price, 533.

<sup>3</sup> Jackson v. Ambler, 14 Johns. 96, at p. 108.

<sup>4</sup> Richter v. Chamberlin, 6 Binney, 34.

arbitrators must have decided the line, to determine the plaintiff's right to sue. But they may have decided it, and correctly. "The defect in the award, in regard to the line, is, not that the arbitrators may not have decided where the line was between the parties, and that correctly; but the defect . . . is, that they have not correctly defined the boundary. There is no want of finality shown in the decision, but a want of certainty in the award."<sup>1</sup> So if the award direct payment of costs and delivery of possession, in addition to finding the boundary, it will be good as to the boundary, though these other matters be without the extent of the submission.<sup>2</sup>

**Excess by Orders made in Respect of Strangers to the Submission.**—If an award gives directions concerning persons or the property of persons who are strangers to the submission, these, if independent of the rest of the award, may be rejected, and the remainder of the award, operating between those persons only who are within the arbitrator's jurisdiction, may be sustained. Thus, if an award orders the defendant to pay a sum of money to the plaintiff and another sum to a stranger, or to execute a lease for life to the plaintiff with remainder in fee to a stranger, the defendant may be compelled to comply with the instructions given for the benefit of the plaintiff, though not with those given for the benefit of the stranger.<sup>3</sup> So also, if one party be directed to make a payment to the other out of funds in his hands, but belonging to one who is no party to the arbitration, this order will be void; but if independent and separable, it may be rejected by itself, and the other and unobjectionable orders of the award will be enforced.<sup>4</sup>

<sup>1</sup> *Giddings v. Hadaway*, 28 Vt. 342. See *Lyle v. Rodgers*, 5 Wheat. 394, *ante*, p. 458.

<sup>2</sup> *Bacon v. Wilber*, 1 Cow. 117. In this case the bonds were more extensive than the submission, and included in their condition the payment of costs and delivery of possession.

<sup>3</sup> *Bretton v. Pratt*, Cro. Eliz. 758; *Bac. Abr. Arb.*, E. 1; *Com. Dig. Arb.*, E. 14; cited in *Russell on Arb.*, 3d ed. p. 313. See also *Barney v. Fairchild*, *Rolle's Abr. Arb.*, N. 9, p. 259, *stated ante*, p. 457.

<sup>4</sup> *Ingram v. Milnes*, 8 East, 444.

The assessment of damages for removing dirt and stones from a certain lot of land was submitted between A. and B., on the presumption that B. was the owner of the land. The referees found the amount of damages, but also found that the title to the land was in B.'s wife, and, though she was a stranger to the submission, ordered that upon payment of the sum named she should join with her husband in a discharge of A. The court were able to decide the case and sustain the award upon other grounds, but they intimated the opinion that even though the direction should be void so far as regarded the wife, yet this might be rejected and the remainder of the award sustained, since the rights of A. could not be thereby injuriously affected.<sup>1</sup>

A submission was entered into between A. and B. The award ordered a certain sum of money to be paid to A. by B. or C. or D. It was obviously inoperative and bad as regarded C. and D., strangers to the submission. But this portion was said by the court to be separable, and the residue stood as a valid order for payment to be made by B.<sup>2</sup>

**Excess by ordering a Verdict or a Judgment.** — If, upon the reference or submission of a cause, the referee or arbitrator finds upon all the substantial points at issue in a satisfactory manner, and, having thereby executed the full measure of his authority, nevertheless proceeds to order an entry of a verdict or of a judgment, it will generally be the case that this latter order may be rejected with prejudice to either party, and the finding upon the merits be sustained as valid.<sup>3</sup>

An arbitrator, whose power did not extend to directing an entry of judgment, awarded in an action of ejectment that "judgment for the plaintiff be entered in the said action, with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land," which the award

<sup>1</sup> *Smith v. Sweeny*, 35 N. Y. 291, at p. 295.

<sup>2</sup> *Cox v. Jagger*, 2 Cow. 638, at p. 651.

<sup>3</sup> *Howett v. Clements*, 1 C. B. 128.



proceeded to describe. The court struck out the portion of the award ordering an entry of judgment, regarding it as surplusage; but they sustained the award as a finding in the plaintiff's favor, since there was a sufficiently obvious determination to this effect, though all mention of the judgment were removed, and this construction would not alter the intention of the award as to the matters within the arbitrator's jurisdiction.<sup>1</sup>

So where it is stipulated that the costs of the action shall abide the event of the arbitration, if the arbitrator, after finding on all the issues, direct a *stet processus*, the direction will be in excess of his authority and void; but, being also clearly separable, it will be rejected, and the rest of the award sustained.<sup>2</sup>

An arbitrator, though having no authority to direct entry of a verdict, yet awarded as follows: "I award and direct that a verdict in this cause be finally entered for the plaintiff, with £284 12s." damages. The court said that if this faulty order for the entry of a verdict had stood by itself in a distinct paragraph, it might have been separated and rejected, and the rest of the award sustained. But since the whole was comprised in one sentence they refused to make the excision, and the whole award was consequently held void.<sup>3</sup> Another instance where the separation was not allowed to be made, but for a more satisfactory reason than the mere form of expression of the award, is furnished by the case of *Hawkyard v. Stocks*, already stated in this chapter.<sup>4</sup>

If the Court cannot distinguish the Excess, the whole Award is bad.—If the arbitrator in his decision mingles matters within and matters not within the submission, and awards upon them collectively, so that the court cannot clearly and surely dis-

<sup>1</sup> Doe d. Body v. Cox, 4 Dowl. & Low. 75.

<sup>2</sup> Ward v. Hall, 9 Dowl. 610.

<sup>3</sup> Jackson v. Clarke, M'Lel. & Y. 200.

<sup>4</sup> 2 Dowl. & Low. 936; *ante*, p. 457.

tinguish how much of the adjudication relates to each class respectively, then the award will necessarily be bad *in toto*.<sup>1</sup>

If the arbitrator's authority to give interest does not extend beyond the date of the submission, and he nevertheless allows interest to a day subsequent to that date, and embodies both principal and interest in one gross sum named, the court, unless it can separate the amount given for interest beyond the date of the submission, will set aside the whole award.<sup>2</sup>

A submission was made to arbitrators concerning the damage sustained or which should afterward be sustained by C. by reason of the flowage of his land caused by the erection of a dam by D. The arbitrators named a sum in damages, and also awarded that the dam be not "raised hereafter more than three feet above the present height." This last order, being in excess of their authority, was held not only to be void, but to be inseparable and to avoid the whole award. "For," said the court, "what influence the privilege of raising the dam to a height not exceeding three feet, awarded to the respondent, might have had in the estimate of damages, we have no means of ascertaining. But as a privilege valuable and important to the one, and calculated to occasion further injury to the other, it must be presumed to have had an influence; and being unauthorized and necessarily interwoven with the damages awarded, the whole proceedings are thereby vitiated."<sup>3</sup>

**Excess by not following the Submission.** — It was agreed that a lease of a colliery should be granted for sixty-three years, which were to begin to run from May 1, 1801; the lessees being allowed three years for winning the colliery rent free. Submission was made to an arbitrator "to give such directions as to a lease, according to the agreement, as he should think fit." Among other things he ordered that the lease should

<sup>1</sup> Russell on Arb., 3d ed. p. 318. See also *Bonner v. Liddell*, 1 Ball & B. 80, stated in the paragraph entitled Excess by not following the Submission, below.

<sup>2</sup> *Watkins v. Phillpotts*, M'Lel. & Y. 393.

<sup>3</sup> *Clement v. Durgin*, 1 Greenl. 300.

be executed to run for sixty-three years from May 1, 1804; therein not following the agreement and exceeding his authority. The court refused to divide the award, and set it aside altogether.<sup>1</sup>

A dispute arose concerning a purchase of cotton made by the defendants for the plaintiffs. Submission was made to arbitrators to determine whether the purchase was warranted by the plaintiffs' instructions; and, if not, then what damage, if any, the plaintiffs had suffered thereby. The arbitrators decided that the purchase was not warranted by the instructions; that the cotton should be taken to account of the defendants, and that the plaintiffs had suffered no damage, since, by placing the cotton to the account of the defendants, the latter would bear any damage or loss arising therefrom. The award was in excess of authority in undertaking to dispose of the title and ownership in the cotton, and it was held that this portion was not separable, for if it were stricken out nothing would be left decided in favor of the plaintiffs. It would appear that the purchase had not been made in accordance with their instructions, yet that they had suffered no damage thereby. This was not apparently the intent of the award, which was accordingly wholly rejected.<sup>2</sup>

**Excess by reserving Further Powers or Duties.**—It is a rule that if the arbitrator reserves further powers or duties of a judicial nature, whether to be performed by himself or by somebody else, he thereby breaks the principle which requires the award to be final and conclusive of the matter submitted. Reservations of this kind may sometimes be rejected as surplusage. But such rejection must of necessity be a very delicate matter. It can never be properly made unless the remainder of the award will contain a full, complete, and final disposition of the controversy. If such a thorough and satisfactory decision has been made, and the reservation is a mere inde-

<sup>1</sup> *Bonner v. Liddell*, 1 Ball & B. 80.

<sup>2</sup> *McBride v. Hagan*, 1 Wend. 326, at p. 340.

pendent adjunct thereto, and has reference to further anticipated disputes which the arbitrator fears may arise in the course of the effort to perform the award by the parties, there is authority for saying that the separation may be made. It would be upon the broad principle of a simple excess of authority in a matter independent and not connected with the good part of the award. The controversy submitted would have been fully and independently decided. But beyond this an effort would have been made to exercise a power or give directions in respect of a matter not included in the scope of the submission. But if the reservation should be in respect of the very matter which is itself in dispute and constitutes the subject of the submission, it is difficult to see how, in the nature of things, a reservation of a further power in reference to it could be construed as entirely independent of and unconnected with the decision already made, which may be only partial, and which certainly is made in the contemplation of possible future change by virtue of this very clause which it is desired to throw out altogether.<sup>1</sup>

If the reservation is of a part of the controversy which the arbitrator is bound to determine and dispose of by his award, then it will not be separable; or if separable, yet no advantage will accrue from the severing, since, after it has been made, the remainder of the award will be bad for want of finality, or as not being coextensive with the submission.<sup>2</sup>

In a very old case an award ordered payment to be made of a certain sum, with the proviso that if the party directed to pay could, before a certain day, disprove the receipt of the goods or furnish better proof of certain alleged payments, the sum to be paid by him should be proportionately reduced. One report of the case states that the reservation was held void, but that the remainder of the report was sustained as good,

<sup>1</sup> See the discussion of this subject, and the cases (which fully bear out the above principle) in Chapter XIV., on Finality, the paragraph entitled Award leaving an Act of a Judicial Nature to be done in the Future, *et seq.*

<sup>2</sup> *In re Tandy v. Tandy*, 9 Dowl. 1044.

on the ground that the arbitrator's authority was exhausted by finding the sum to be paid, and the further directions were surplusage.<sup>1</sup> Another report simply says that the court took time to consider whether or not the separation should be permitted.<sup>2</sup>

An action respecting a water-course, and all matters in difference, were referred to an arbitrator. After ordering a verdict, and that certain works should be done by the defendant, he proceeded to provide that if disputes should arise as to the manner in which these works should be done, within a certain time specified, the matter should be brought before him again for final adjustment in these particulars. It was held that the award was a complete and final decision of the matters in controversy, taken without this clause of reservation; that this objectionable part, since it related exclusively to prospective difficulties, was independent and separable, and should be rejected.<sup>3</sup>

An award provided that if, before a certain day, the defendant could prove that he had delivered certain currants to the plaintiff, then the arbitrators or an umpire would make a further award; but if he could not prove it, then that the plaintiff should be free from any claim. It was further ordered that the defendant should pay a certain sum to the plaintiff, unless the arbitrators or an umpire made a further award concerning the currants within a certain time. No further award was in fact made within the time limited. But the court held the award to be altogether void; for they considered that the clause which ordered the defendant to pay, had dependence upon the prior clause, which contemplated the making of a further award, and which was obviously void, as being a reservation of authority of a judicial nature.<sup>4</sup>

<sup>1</sup> *Beckwith v. Warley*, Rolle's Abr. Arb., H. 9, p. 250.

<sup>2</sup> *Warley v. Beckwith*, Hob. 218; and see Russell on Arb., 3d ed. p. 315.

<sup>3</sup> *Manser v. Heaven*, 3 Barn. & Ad. 295.

<sup>4</sup> *Brown v. Dalton*, Rolle's Abr. Arb., H. 10, p. 250; Russell on Arb., 3d ed. p. 320.

Where, in an arbitration concerning a lease, the arbitrator ordered the premises to be put in repair to the satisfaction of a third party, this clause, which was fatal to the finality of the award, was held to be inseparable from the remainder, and to operate to avoid the award altogether.<sup>1</sup>

**Separation will not be allowed, if the Decision of the Principal Point in Dispute is to be rejected.** — Though the award be in its nature articulate and separable, yet if the result of the separation would be to eliminate the principal part as bad, and to leave the award to operate only as a disposition of secondary matters, or adjuncts of the main question in controversy, the severance will not be made; but the whole award will be treated as void. To this effect is the following English case: Certain farmers, considering that they were overrated to the poor-rate in proportion to other parishioners, entered into a submission with the church-wardens and overseers, by which three several matters were left to be determined by the arbitrators; to wit, the validity of the rate, the payment of the costs of preparing for an appeal to the sessions respecting it, and the costs of the reference. The arbitrators awarded upon each of these points separately. The Court of Exchequer held that the principal subject-matter of the submission, viz., the validity of the rate, could not lawfully be submitted to arbitration. As to this, therefore, the award was void; and though this was a distinct and independent article of the award, still, since it was the main point in controversy, it should not be eliminated, but the whole award should be declared void.<sup>2</sup>

**Award of a Gross Amount, covering Matters not within the Arbitrator's Authority.** — It is obvious that if the arbitrators exceed their authority, and consider and determine matters not submitted to them, their award of a gross amount must as a general rule be bad;<sup>3</sup> for generally no sufficient and satis-

<sup>1</sup> Tomlin v. Mayor of Fordwich, 5 Ad. & El. 147.

<sup>2</sup> Thorp v. Cole, 4 Dowl. 457.

<sup>3</sup> Thrasher v. Haynes, 2 N. H. 429; Chase v. Strain, 15 id. 535; De Groot v.

factory means will exist for apportioning such a finding between the good and the bad considerations which have been brought together in order to make it up.

A gross sum was allowed for land, machines, appliances, and personal property. The subject-matter of the arbitrator's authority did not embrace the land. It was held that since it was impossible to tell what proportion of the whole sum was allowed on account of this item, no separation could be effected, and the whole award must fall.<sup>1</sup>

A submission was entered into between the joint owners of a vessel "concerning her earnings and expenses." An award was made ordering payments of certain gross amounts to be made between the parties, with no specification of items. It was shown that the arbitrators had included in their estimate the cost of insurance. This was held to be in excess of their authority, and since there were no means by which the amount of this erroneous allowance could be ascertained or accurately estimated, the award was necessarily indivisible and altogether void.<sup>2</sup>

A submission authorized the arbitrators to find damages for *past* misconduct only on the part of the defendant in the use of a water-power. They awarded certain sums of money to be paid "in full satisfaction of all past and future damages." No means being afforded for a separation, the whole award was held to be void.<sup>3</sup>

An award was for a gross sum to be paid by one party to the other. It appeared, upon a trial of this specific issue, that in this was included a note which the payee under the award did not receive until after the date of the submission, and which, therefore, was not within its scope. It was held that there

United States, 5 Wall. 419; *Watkins v. Phillpotts*, M'Lel. & Y. 393; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125; *Gordon v. Tucker*, 6 Maine, 247.

<sup>1</sup> *De Groot v. United States*, 5 Wall. 419, at p. 431.

<sup>2</sup> *Sawyer v. Freeman*, 35 Maine, 542.

<sup>3</sup> *Boynton v. Frye*, 33 Maine, 216.

could be no separation, and that the whole award was void.<sup>1</sup> It was so held also in another case, where a stale note had been wrongfully included in an award of a gross sum, upon the ground that the amount which the arbitrators had "awarded on account of the note did not appear on the face of their award."<sup>2</sup>

A case in equity was referred to an arbitrator. By the terms of the submission, he was expressly precluded from disallowing a particular sum which the defendants admitted to be due from them. Nevertheless, after finding the general balance due from them, he stated in his award that he had not charged them with this sum. The award was declared to be bad by reason of this disallowance. The defendants offered to allow the amount in account against themselves. But the Master of the Rolls held that the error could not be thus cured, and set aside the whole award.<sup>3</sup>

A reference was made, among other things, concerning the defendant's bill of costs, as an attorney; the arbitrator was to ascertain the balance between the parties, but no question of liability was to be raised. The court held that the arbitrator ought not to have made any deductions from the defendant's bill by reason of his not having been admitted an attorney of one of the superior courts of Westminster; and, it having been shown by affidavits that he, in fact, had made such deductions, the whole award was set aside.<sup>4</sup>

**Separation of an Award finding a Gross Sum may sometimes be made.**— It will be observed that the preceding cases, in which separation in an award of a gross sum has been refused, have proceeded upon the basis of the non-existence of any sufficient standard for effecting the elimination accurately. It cannot be told with certainty, it is said, how much the arbitrators have

<sup>1</sup> *Thrasher v. Haynes*, 2 N. H. 429.

<sup>2</sup> *Adams v. Adams*, 8 N. H. 82, at p. 92.

<sup>3</sup> *Skipworth v. Skipworth*, 9 Beav. 135.

<sup>4</sup> *Harries v. Thomas*, 2 Mee. & W. 82; *Russell on Arb.*, 3d ed. p. 319.



allowed on account of the matters wrongfully considered and included by them. If the reason of the rule fails, however, the rule itself may fail. It is not an arbitrary dogma. Accordingly it has been said by the court in Vermont, that the fact that the statement of the award is in the aggregate does not always or necessarily render it indivisible. If, from facts appearing on its face, it has evidently been made up from distinct items, and so made up that these items are capable of being accurately severed, then the separation may be made for the purpose of avoiding a portion and sustaining a portion.<sup>1</sup>

It will be observed that this adjudication says that the separability of the items must be apparent on the face of the award. It is impossible to go outside of the instruments before the court, and by evidence *dehors* to show to the court the means by which the arbitrators have arrived at the sum named by them. In *Sawyer v. Freeman*,<sup>2</sup> it is probable that the evidence offered to show that the arbitrators had included insurance might have been extended by the other party to show how much they had allowed for it; but no intimation appears that this would have been allowed. In *Thrasher v. Haynes*,<sup>3</sup> the error lay in the allowance of the amount of a note; a sum which it is natural to suppose could have been ascertained had the court been willing to do so. In *Skipworth v. Skipworth*,<sup>4</sup> the erroneous allowance was of a specific sum, stated in the award, yet no separation was made. This case, it must be admitted, goes directly against the general principle enunciated in this paragraph.

An award was published verbally to the parties, to the effect that damages were found for one in a certain sum. The arbitrators at the same time stated to the parties the several items which they had allowed. Afterward, at the request of a party,

<sup>1</sup> *Dalrymple v. Town of Whitingham*, 26 Vt. 345.

<sup>2</sup> 35 Maine, 542, *ante*, p. 475.

<sup>3</sup> 2 N. H. 429, *ante*, pp. 475, 476.

<sup>4</sup> 9 Beav. 135, *ante*, p. 476.

they made a statement of their finding in writing, in which they set forth only the gross sum found by them. Two of the items, verbally declared by them, were for matters which were beyond the scope of their authority. These the court allowed to be deducted in a suit brought for the gross sum, and a judgment to be rendered for the balance.<sup>1</sup>

A submission under a building contract authorized the arbitrators to award only concerning the cost which might be caused by certain alterations made from the original design. But, exceeding this scope, allowance was made for workmanship and materials, alleged to be defective, in parts of the building not altered from the original plan. The award was for a gross sum. It was proposed to separate the good part of the award from the bad by the aid of an account kept by a clerk at the meetings of the arbitrators, from which, it was said, the amount of the items properly allowable could be ascertained. But the court refused, on the ground that there "had not been any formal adjudication as to the amount properly allowable under those items. The account contained a mere estimate. Neither party could make use of it by way of charge or discharge. It was not conclusive evidence of the amount due."<sup>2</sup>

**The Presumptions will be favorable to Separation.**— Though it is not allowed to go outside of the award to establish the propriety of separation, yet, in construing the award itself, it appears that the doctrine of favorable intendment in support of the award will be carried so far that, if an award be bad in part and good in part, it will be presumed that there is no connection between these parts unless the contrary is to be affirmatively gathered from the face of the award. •

A submission was entered into between an insurance company and the assured, in respect of the amount of money to be paid in compensation for a loss. The arbitrators named the

<sup>1</sup> *Dalrymple v. Whittingham*, 26 Vt. 345.

<sup>2</sup> *Mayor, &c., of New York*, 1 Barb. 325, at p. 336.

sum, and then ordered that the assured should assign to the company his claims against another company in respect of the same loss. The court said: "We cannot, on the face of the award, see any necessary connection or dependence between the part which requires the defendants to pay and that which directs the plaintiff to assign. The assignment is not made a condition to the payment, nor does it appear that the arbitrators intended that one act should be performed as the consideration, either in whole or in part, for the performance of the other. Looking at the award alone, we are not authorized to say that the arbitrators would not have directed the payment of the money unless there was to be an assignment of the claim against the S. company, nor that a greater sum was awarded to the plaintiffs in consequence of awarding an assignment." The doctrine of favorable presumption was then invoked as conclusive in favor of the divisibility.<sup>1</sup>

Parties submitted to arbitration "all matters of controversy subsisting between them, whether debt, damages, costs, title to lands, or any other matter whatsoever." The arbitrators in their award established certain boundary lines, saying with regard to one, "where said P. has slightly encroached on said A., which we take into account in the assessment of damages between the parties." They further said that, "on examining and assessing the sums respectively due to each other for damages, costs, &c.," and striking a balance, they found a certain sum due from A. to P. The submission was not framed with the necessary formalities for enabling the arbitrators to award upon questions of title to real estate. It was insisted, against the award, that the indefinite finding for "damages, costs, &c.," included an estimate for A.'s land, found by the arbitrators to be on P.'s side of the fence. The court, however, fell back upon the doctrine of favorable presumption; said that "it could not be inferred necessarily nor even probably that the arbitrators estimated any damages ex-

<sup>1</sup> Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. 125.

cept for the trespass by encroachment;" and sustained this portion of the award.<sup>1</sup>

A submission gave to the arbitrators certain powers concerning claims arising prior to a certain date; in their award the arbitrators exercised these powers also as to claims (if any such there were, which did not appear) arising subsequent to the stipulated date. The court refused to presume, merely for the purpose of invalidating the award, that if any claims had arisen subsequent to the date, they would not be of such a nature as to be easily distinguishable and separable from the rest, so that thereby the residue of the award might be sustained.<sup>2</sup>

**The Desire of the Courts is to make the Separation.**—As has been stated in the chapter upon Rules of Construction, the purpose of the courts is always to construe an award liberally, and to uphold it if possible. The same principle comes into play in connection with this matter of divisibility. It is always considered desirable to make a separation where it is possible to do so without prejudice to the interests of either disputant, and where doing so will have a materially good effect in quieting controversies.<sup>3</sup>

But it is obvious that such a severance is matter of great delicacy. It can only proceed upon the theory that the portion retained has been in no manner affected by the consideration in the minds of the arbitrators of the part rejected. It is therefore, in most instances, little short of an effort to trace the workings of another man's mind simply upon an examination of the results at which he has arrived. The process is obviously full of danger; yet in the interests of quiet and the settlement of disputes it must often be undertaken. Its difficulty has been observed and commented upon by jurists; and Lord Denman, C. J., once said, in a case where he was asked

<sup>1</sup> *Parmelee v. Allen*, 32 Conn. 115.

<sup>2</sup> *Richardson v. Huggins*, 23 N. H. 106, at p. 113.

<sup>3</sup> *Butler v. Mayor, &c.*, of New York, 1 Hill, 489.

to make such a separation, that he "always found a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other, and each may be varied by the view which he takes of the whole."<sup>1</sup>

Russell considers that "this observation is worthy of attention, since it seems to embody the principle on which the courts will act at the present day, when they are called upon to decide whether an award, clearly bad in part, can be separated as to the remainder. For it must often happen that a direction, perfectly separable as far as the grammatical construction of the award is concerned, is the ground on which the arbitrator has proceeded in making some equivalent provision affecting the other party."<sup>2</sup>

**Separation in Cases of an Uncertainty in Part of the Award.**—Uncertainty in a portion of the award may or may not necessarily avoid the whole award, according as the uncertain portion is or is not inseparably connected with the rest. Thus if an award be so uncertain in part that one party, A., cannot enforce fulfilment by the other party, B., then it is not divisible for the benefit of B., so that he may enforce the things enjoined to be done by A. in his favor.<sup>3</sup> But where an arbitrator, having power over costs, gave directions concerning them which were void for uncertainty, it was held that the remainder of his award, embracing his decision concerning the debt or damages due from one party to the other, should be sustained.<sup>4</sup>

A dispute arose between two parties under a contract to build a house. The award ordered one to pay to the other a

<sup>1</sup> *Tomlin v. Mayor of Fordwich*, 5 Ad. & El. 147.

<sup>2</sup> *Russell on Arb.*, 8d ed. p. 320.

<sup>3</sup> *Schuyler v. Van Der Veer*, 2 Caines, 235.

<sup>4</sup> *Morgan v. Smith*, 1 Dowl. N. S. 617; *England v. Davison*, 9 id. 1052; *Addison v. Gray*, 2 Wils. 293; *Bargrave v. Atkins*, 3 Lev. 413; *Pinkny v. Bullock*, cited 3 Lev. 413; *Addison v. Spittle*, 18 L. J. Q. B. 151. See also *Bac. Abr. Arb.*, E. 3; *Thinne v. Rigby*, Cro. Jac. 314; *Pope v. Brett*, 2 Saund. 293 b; *Orcutt v. Butler*, 42 Maine, 83.

certain sum, and ordered the latter to finish the house. The order concerning the finishing the house was so uncertain as to be incapable of enforcement and void. It was held that it could not be separated and rejected, but that the whole award must fail.<sup>1</sup>

Separation may sometimes be effected where the Party losing thereby will waive his Advantage or Objection based on the Bad Part. — It is noticeable in the case of *Inhabitants of Leominster v. Worcester Railroad Company*,<sup>2</sup> that the party moving to have the award confirmed was the party in whose favor the uncertain order in respect of costs was made. The loss, by reason of the separation and rejection of the bad part, fell upon the party who sought to have the award sustained. It was a loss which he was willing to suffer rather than have the entire award set aside and the controversy reopened. Had the position of the parties been reversed, a different decision might not improbably have been rendered. Thus says also Mr. Russell. After stating several cases, already cited in this chapter, he adds: "It may be observed, with regard to the class of cases above cited, that although the courts have refused to allow the party who is ordered to do certain acts to object that the award is wholly void, because the arbitrator has awarded something within his power, and also something beyond, yet it by no means follows that in many of them the award would not have been set aside *in toto*, had the complaint come from the other party that he could not, by reason of the badness of the award in one particular, receive all the benefit the arbitrator contemplated to give him."<sup>3</sup>

So, likewise, in cases where the arbitrator has power to award concerning the costs, if he orders the defendant to pay to the plaintiff a certain sum by way of debt or damages, and

<sup>1</sup> *Schuyler v. Van Der Veer*, 2 Caines, 235.

<sup>2</sup> 7 Allen, 38, stated *ante*, p. 463.

<sup>3</sup> Russell on Arb., 3d ed. pp. 315, 316; *Taylor v. Shuttleworth*, 8 Dowl. 281.

also to pay the costs of the action ; and if this order as to costs be bad for uncertainty for any reason (as if the action be pending in an inferior court where no taxation of costs can be made, and it was therefore the arbitrator's duty to ascertain their amount), or if he was specially directed by the submission to ascertain the amount, the court will nevertheless separate the order for payment of costs, and allow the plaintiff, if he be content to forego this part of the award, to enforce the remainder which ascertains and orders payment of his debt or damages.<sup>1</sup>

**An Award in the Alternative may be separated.** — If an award be made in the alternative, and one alternative be bad, impossible, or uncertain, the other will stand absolutely as the award.<sup>2</sup>

**Effect of an Offer to perform an Inoperative Order.** — It is said that where the good part of the award is connected with and dependent upon the bad part, so that they must fall together, an offer to perform the bad part made by the party intended to be bound thereby would *perhaps* remove the objection, and enable him to enforce performance of the good portion by the other party.<sup>3</sup>

**Effect of Separation on Directions concerning Fees.** — Where a part of the award is void and a part sustained, the directions concerning the payment of fees will not be interfered with, if it so happens that the labors of the arbitrators were not apparently increased by the consideration of the questions which they have decided wrongly ; *i.e.*, where, substantially, the same investigation has covered both the rightly and the wrongly determined points.<sup>4</sup>

<sup>1</sup> Morgan v. Smith, 1 Dowl. n. s. 617 ; England v. Davison, 9 Dowl. 1052 ; Addison v. Gray, 2 Wils. 293 ; Bargrave v. Atkins, 3 Lev. 413 ; Pinkny v. Bullock, cited 3 Lev. 413 ; Addison v. Spittle, 18 L. J. Q. B. 151.

<sup>2</sup> Simmons v. Swaine, 1 Taunt. 548 ; Wharton v. King, 2 B. & Ad. 528 ; Lee v. Elkins, 12 Mod. 585 ; Oldfield v. Wilmer, 1 Leon. 140, 304.

<sup>3</sup> Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. 125. But see Skipworth v. Skipworth, 9 Beav. 135, which is rather at variance with this rule.

<sup>4</sup> Giddings v. Hadaway, 28 Vt. 342.

**The Court may hold a Separable Award under Advisement.** — If an award appears to be in part good and in part bad, it has been declared that the court may hold it for a time under advisement, to await the production of evidence which there is an expectation of producing, and which may sustain it in whole.<sup>1</sup>

**Suits instituted upon Separable Awards.** — In a suit based upon a separable award, if the suit be brought only to enforce that part of the award which is good, it is said that the court will allow the plaintiff to prevail.<sup>2</sup> Whence it appears that there is no necessity for any preliminary or distinct proceedings to be had with a view to establishing the fact of divisibility or actually effecting the separation. Indeed, all the cases show, though none of them pass upon the specific point, that the good portion of a separable award may be availed of, by itself, either as a cause of action, or by way of defence or bar, precisely as an entirely good award might be availed of for the same purposes. The separation may be said to be an incidental matter, and will be made by the court whenever an objection founded upon the bad part is presented and urged by a party as an objection to the whole.

If the award is of a gross sum, and some of the items upon which it is founded ought not to have been considered or included by the arbitrators, the plaintiff may declare in assumpsit for the aggregate amount, and the items as to which the award is bad may be disallowed by the court, and judgment rendered for the balance. Though it is said that if the form of action were in debt on the bond, it would be more proper to set up merely so much of the award as is valid, and assign a breach of that, since non-performance of that part only would be a breach of the bond.<sup>3</sup>

<sup>1</sup> *Dennis v. Barber*, 4 Binney, 484.

<sup>2</sup> *Orcutt v. Butler*, 42 Maine, 83.

<sup>3</sup> *Dalrymple v. Town of Whitingham*, 26 Vt. 345.



So likewise it would seem that any article in an award, which article is in itself wholly good, may be singled out and made the independent basis of a suit, as a complete cause of action.<sup>1</sup>

<sup>1</sup> See *Lamphire v. Cowan*, 39 Vt. 420 ; *Schuyler v. Van Der Veer*, 2 Caines, 235.

## CHAPTER XVIII.

### EFFECT AND OPERATION OF THE AWARD.

An award is final and conclusive.

An award in evidence is conclusive.

Impeaching by evidence an award put in evidence.

An award is equivalent to a decree in equity.

An award on illegal matters is void.

Effect of a colorable award.

Legal character of an award under seal.

An award constitutes a merger and bar of the original claim.

A case where the merger is not effected.

A void award effects no bar or merger.

Extent of the operation of the award in respect of the matters submitted.

English cases sustaining the rule of conclusiveness as to all matters submitted.

An award ordering general releases is final as to all matters submitted.

The English rule in equity is doubtful.

The English rule in equity concerning unintentionally omitted matters.

The English rule seems intrinsically just.

The rule of conclusiveness as to matters omitted, in New York.

The rule in New York where the scope of the submission is doubtful.

The rule in Connecticut.

The rule in Vermont.

The rule in Maine.

The rule in New Hampshire.

The rule in Massachusetts.

Effect on the rule of a deliberate refusal to present a claim.

An award not deciding the controversy is no bar.

Award under a submission of matters "in difference."

The award bars only the precise matter submitted.

Pleading an award in bar to a matter not disposed of by it.

The burden of proof where an award is pleaded in bar.

Whether a party not having performed his part of an award can plead it in bar.

A condition precedent must be performed before an award is a bar.

An award is pleadable in bar to a bill in equity.

Pleading an award in set-off.

Operation of an award to vest the title to personalty.

An award as to chattels of the wife is a reduction into possession.

Operation of an award upon the title to real estate.

An award of commissioners under a statute may pass title.

An award finding title to realty will sustain an action in ejectment.

Operation of awards determining boundary lines.

An award finding title or settling a boundary line is a defence in trespass.

An award finding title, not under seal, will operate by way of estoppel.

Operation of an oral award concerning a boundary line.

An oral award under an oral submission concerning a boundary line is competent evidence.

Estoppel by an award need not always be pleaded.

Operation of an award simply finding title.

Operation of an apparently inadequate award.

An award is inoperative as to strangers.

An award is inadmissible in evidence against a stranger.

An award may sometimes be competent evidence for a stranger.

A stranger may by his own act bring himself within the operation of an award.

A stranger cognizant of the submission may be within the operation of the award.

Parties are bound though the award concerns the rights of a stranger.

Operation as to sureties of an award extending time for a principal debtor.

The rights of a party under an award may pass to a stranger by assignment.

An award is not evidence in a criminal prosecution.

Operation of an award in a *lis pendens*.

Operation of an award in a *lis pendens*, including extrinsic matters.

Effect of the bankruptcy of a party on the operation of an award.

An award creates a debt provable in bankruptcy.

Recitals in an award as evidence.

A valid award needs no ratification.

But voidable awards may be rendered operative by ratification.

A void award cannot be ratified.

Ratification by an agent.

An award repudiated by both parties cannot be revived.

**An Award is final and conclusive.** — A valid award operates as a final and conclusive judgment, as between the parties to the submission or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.<sup>1</sup> It stands good for all time,<sup>2</sup> unless the award itself (in which event it may probably not be final), the submission, or the statute under which the arbitration is had, specifically limit its effect to some shorter period.<sup>3</sup>

<sup>1</sup> *Coleman v. Wade*, 2 Seld. (N. Y.) 44; *Girdler v. Carter*, 47 N. H. 305; *Bannel v. Pinto*, 2 Conn. 431; *Wheeler v. Van Houten*, 12 Johns. 311; *Fidler v. Cooper*, 19 Wend. 285; *Curley v. Dean*, 4 Conn. 259; *Varney v. Brewster*, 14 N. H. 49; *Russell on Arb.*, 3d ed. p. 476; *Sybray v. White*, 1 Mee. & W. 435; *Whitehead v. Tattersall*, 1 Ad. & El. 491; *Bailey v. Lechmere*, 1 Esp. 375.

<sup>2</sup> *Day v. Bonnin*, 3 Bing. N. C. 219; *Bird v. Cooper*, 4 Dowl. 148; *Bacon Abr. Arb.*, E.; *Stonehewer v. Farrar*, 9 Jur. 203; *Dudgeon v. Martin*, 1 McQueen H. of L. 714.

<sup>3</sup> See *Russell on Arb.*, 3d ed. p. 476.

**An Award in Evidence is conclusive.**—A valid award, produced in evidence, is conclusive between the parties. So long as it remains unimpeached, it cannot be contradicted by other evidence.<sup>1</sup>

The rules of practice at common law allow an award to be given in evidence under the general issue of *non assumpsit*.<sup>2</sup>

Generally, it is not evidence as an account stated,<sup>3</sup> though there are instances of its having been admitted as such.<sup>4</sup>

In an action of assumpsit against an executor, in which the defendant pleads *plene administravit*, an award finding a sum due from the testator's estate, but not directing payment, cannot be offered in evidence by the plaintiff as constituting an admission of assets, and so defeating the plea.<sup>5</sup> But if the award contain an order for payment by the executor, it seems that it is then conclusive evidence of assets.<sup>6</sup>

An award between the same parties, determining the title to land, is conclusive evidence of the right in a subsequent action of ejectment.<sup>7</sup>

**Impeaching by Evidence an Award put in Evidence.**—The doctrine is laid down by Russell that when an award is tendered in evidence, the opposite party may offer evidence in reply to impeach its validity. Its binding effect having been thus done away with, evidence becomes admissible as to the matters professedly determined by it.<sup>8</sup>

<sup>1</sup> Russell on Arb., 3d ed. p. 536; Sybray v. White, 1 Mee. & W. 435; Whitehead v. Tattersall, 1 Ad. & El. 491; Bailey v. Lechmere, 1 Esp. 375; and see *ante*, the first paragraph in this chapter.

<sup>2</sup> Russell, *ubi supra*; Allen v. Milner, 2 Cr. & Jer. 47; Kingston v. Phelps, 1 Peake, N. P. 299.

<sup>3</sup> Bates v. Townley, 2 Exch. 152.

<sup>4</sup> Keen v. Batshore, 1 Esp. 194 (*per* Lord Ellenborough); Salmon v. Watson, 4 Moore, 73.

<sup>5</sup> Pearson v. Henry, 5 Term, 6.

<sup>6</sup> Worthington v. Barlow, 7 Term, 453; this subject has been already discussed in Chapter I. p. 19 *et seq.*

<sup>7</sup> Doe d. Madkins v. Horner, 8 Ad. & El. 235; Doe d. Morris v. Rosser, 3 East, 15; and see *post* in this chapter, the paragraph "An Award finding Title to Realty will sustain an Action in Ejectment."

<sup>8</sup> Russell on Arb., 3d ed. pp. 540, 541; Whitehead v. Tattersall, 1 Ad. & El. 491.

If an award made pursuant to a submission of all matters in difference is offered in evidence by the one party, the other may prove that some of the matters embraced in the submission have not been determined or disposed of by the award.<sup>1</sup>

Mistake or misconduct of the arbitrator cannot be given in evidence to impeach an award which is put in evidence.<sup>2</sup>

**An Award is equivalent to a Decree in Equity.**—In equity, an award rendered in pursuance of a submission by order of the court is regarded as a decree, and as equally if not more conclusive.<sup>3</sup>

Yet a court of chancery will not always suffer an award to be made binding upon its own officers. Thus, where accounts were directed to be taken by a master, and by consent liberty was given to the parties to submit to arbitration any question of account, the court allowed the master to accept and adopt the conclusions of the arbitrator, but refused, even by consent, to make it compulsory upon him so to do.<sup>4</sup>

**An Award on Illegal Matters is void.**—If the subject-matter of the submission consists of transactions clearly illegal, or such as cannot properly be referred or submitted, the award will be inoperative and unenforceable.<sup>5</sup>

**Effect of a Colorable Award.**—A somewhat singular custom is mentioned by Russell as having at one time been prevalent in Scotland. Though nowhere else in the law-books does any trace of such a proceeding appear, yet, as it is one which might at any time happen to be conceived and resorted to by an ingenious counsel, it seems worth mentioning here. It seems that parties who had had matters in dispute between them, concerning which they had succeeded in coming to an agree-

<sup>1</sup> *Ingram v. Milnes*, 8 East, 444.

<sup>2</sup> See Chapter XIX.; *Swinford v. Burn*, Gow N. P. 5; *Johnson v. Durant*, 2 Barn. & Ad. 925.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 477; *Travers v. Lord Stafford*, 2 Ves. Sen. 19; *Pitcher v. Rigby*, 9 Price, 79.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 477; *Scale v. Fothergill*, 8 Beav. 361.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 481; *Steers v. Lashley*, 6 Term, 61; *Thorp v. Cole*, 4 Dowl. 457; 2 Cr. Mee. & Ros. 367; 1 Mee. & W. 531.

ment, were wont to throw that agreement into the form of a submission and a "decreet arbitral," with the purpose of giving it a binding force. The opinion, says Russell, was entertained by some of the most eminent men at the Scotch bar that a decreet arbitral might properly be used to carry an agreement into execution, and might have the technical effect and validity of such a legal instrument, though used in this peculiar way. But the question having been finally brought before the House of Lords, it was decided in the contrary way, to the effect that an agreement carried out under color of a submission and decreet arbitral could not be regarded as a valid submission or a valid decreet arbitral.<sup>1</sup>

**Legal Character of an Award under Seal.** — An award under seal is not a deed, unless it be delivered to take effect as such; ordinarily it is merely an instrument under hand and seal.<sup>2</sup>

**An Award constitutes a Merger and Bar of the Original Claim.** — Like a judgment the award operates to merge and bar the original claim. After the award has been rendered, the suit must be upon it, or upon the covenants of the submission or bond. The subject-matter of the arbitration no longer subsists as an independent cause of action. As such it has been completely disposed of.<sup>3</sup>

Thus if the subject of the submission is a contract existing between the parties, the legal operation of the award will be to extinguish such contract.<sup>4</sup>

**A Case where the Merger is not effected.** — The following case, though decided in Arkansas, must be acknowledged to contain a sound and sensible ruling on the law of merger by an award made. The controversy submitted was concerning a lease; the

<sup>1</sup> Russell on Arb., 3d ed. pp. 477, 478; *Maule v. Maule*, 4 Dow, 363; *Routledge v. Carruthers*, 4 Dow, 392.

<sup>2</sup> Russell on Arb., 3d ed. pp. 241, 477, 516; *Brown v. Vawser*, 4 East, 584; *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Dod v. Herbert*, Sty. 459; *Perry v. Nicholson*, 1 Bur. 278; *Hodsden v. Harridge*, 2 Saund. 64 l.

<sup>3</sup> *Duren v. Getchell*, 55 Maine, 241; *Girdler v. Carter*, 47 N. H. 305; *Armstrong v. Masten*, 11 Johns. 189.

<sup>4</sup> *Varney v. Brewster*, 14 N. H. 49; *Curley v. Dean*, 4 Conn. 259.

award directed that the lessee should continue to pay rent to the amount and in the manner directed in the lease. It was held that an action could thereafter be brought on the original covenants of the lease ; for that such an award did not operate to merge and destroy the right of action on the original instrument.<sup>1</sup> The general principle derivable from this, that an award simply affirming the provisions of an existing document does not so far supersede that document that any subsequent action can be only on the award, seems to be eminently just and reasonable. Mr. Russell, in discussing the matter of pleading an award, has a remark of similar import ; to the effect that an award directing a payment cannot be pleaded in bar to an action for the original debt without an allegation of performance. "For the money, until paid, is due in respect of the original debt ; as, for instance, if the claim be for tolls, the sum awarded is due for tolls still." <sup>2</sup>

**A Void Award effects no Bar or Merger.** — Where the award is void, resort may be had to the original cause of action, which will not be treated as having been barred or merged or in any other way destroyed.<sup>3</sup>

**Extent of the Operation of the Award in Respect of the Matter submitted.** — The most interesting and important question which arises in the discussion of the operation and effect of an award concerns *its extent*. Does an award operate as a final determination, disposition, or bar in respect of all matters embraced and included within the scope of the submission ; or does it so operate only in respect of those matters which are, in fact, mentioned by, or by the necessary implication of its language are included within, the instrument itself ? The English cases, collected by Mr. Russell with his usual care and thoroughness,<sup>4</sup> are substantially unanimous in support of the former principle.

<sup>1</sup> Keeler v. Harding, 23 Ark. 697.

<sup>2</sup> Russell on Arb., 3d ed. p. 524.

<sup>3</sup> Mayor of New York v. Butler, 1 Barb. 325 ; Haggart v. Morgan, 5 N. Y. 422 ; Hart v. Lauman, 29 Barb. 410 ; Morton v. Cameron, 3 Robertson, 189.

<sup>4</sup> Russell on Arb., 3d ed. pp. 478-480, inclusive.

The cases decided in the courts of the United States are less uniform; but the majority of them incline rather towards the latter doctrine. Beginning with the foreign adjudications, we find them as follows:—

**English Cases sustaining the Rule of Conclusiveness as to all Matters submitted.**—It is said that after an award has been made, no action can be maintained based upon any dispute, demand, or any cause of action whatsoever, which was within the scope of the submission, even though the same was not in fact presented or urged before the arbitrators, or decided by them.<sup>1</sup>

A railway company took lands of the plaintiff, and retained possession of them for several years, without, however, being entitled thereto. The plaintiff then instituted a suit in ejectment. On the trial the cause and all matters in difference were referred, and it was ordered that the arbitrator should determine what sum should be paid to the plaintiff by way of price or compensation for the land taken. The plaintiff upon his part undertook to execute or procure to be executed such conveyances as the arbitrator might direct. The award was, that the verdict for the plaintiff should stand, that a certain sum should be paid to the plaintiff by the defendant corporation as a price and compensation for the land taken, that there were no other matters in difference between the parties, and that the payment should be taken to be in full satisfaction of all matters in difference. The court held that the plaintiff could not maintain a subsequent action to recover the mesne profits of the land taken; that the order that the verdict for the plaintiff should stand intended merely that he was entitled to the land at the time of the institution of his suit; that by virtue of the reference of all matters in difference, the arbitrator was bound to consider as a matter in difference all claims for mesne profits,

<sup>1</sup> *Dunn v. Murray*, 9 Barn. & Cr. 780; *Dicas v. Jay*, 6 Bing. 519; *Smith v. Johnson*, 15 East, 213; *Collins v. Powell*, 2 Term, 756; *Clegg v. Dearden*, 12 Q. B. 576.



both before and after the order of reference; that though the award was apparently defective, by reason of not containing any directions for conveyances, yet it might possibly be sustained upon the presumption that the railway company had acquired title to the land in the interval between the making the order of reference and the rendition of the award.<sup>1</sup>

Arbitrators omitted from their consideration and award a certain demand which was clearly within the submission, but which they erroneously regarded as removed from the scope of the arbitration by reason of the fact that it was admitted by the opposite party to be correct and valid. Discussing the propriety of setting aside the award altogether by reason of this defect, the court intimated the opinion that should they refuse to do so, and allow the award to stand, it would be a matter of great difficulty (though they did not here say that it would be impossible) to recover this omitted indebtedness by any subsequent proceeding.<sup>2</sup>

**An Award ordering General Releases is final as to all Matters submitted.** — If an award directs mutual general releases to be exchanged between the parties, it thereby closes all demands between the parties existing up to the date of the submission. If, therefore, a subsequent submission be entered into between them, the arbitrator acting thereunder cannot go behind the date of the earlier submission. That forms an absolute boundary, beyond which he cannot trespass for any cause. If he does so, and considers a matter in dispute existing prior to that date, which therefore was properly embraced in the previous submission, and might have been disposed of by the previous award, he will exceed his authority, although as matter of fact this specific controversy was not considered or determined at the foregoing arbitration.<sup>3</sup>

<sup>1</sup> *Smalley v. Blackburn Railway Company*, 2 Hurl. & Nor. 158; 27 L. J. Exch. 65; Russell on Arb., 3d ed. p. 483.

<sup>2</sup> *In re Robson & Railston*, 1 Barn. & Ad. 728; but see *Ravee v. Farmer*, 4 Term, 146; and *Golightly v. Jellicoe*, ib. 147 n.; stated *post*, under this same heading.

<sup>3</sup> *Trimingham v. Trimingham*, 4 Nev. & Man. 786.

**The English Rule in Equity is doubtful.** — “How far a suit will lie in equity,” says Russell, “in respect of a matter neglected to be brought forward, is not quite clear.”<sup>1</sup>

**The English Rule in Equity concerning unintentionally omitted Matters.** — In a case arising in a court of equity in Ireland, it was said that an award would indeed be a bar in respect of any claim or demand which was intentionally held back by the claimant at the proceedings before the arbitrators. But if the omission to present it were purely accidental, or if the arbitrators had refused to consider it when offered, on the ground of its not being within the scope of the submission, the rule would be otherwise, and the award would not be a bar.<sup>2</sup>

A submission of all matters in difference was entered into for the purpose of winding up the affairs of a partnership and dividing the capital. By an accidental omission, an item in the account of good debts owing to the partnership was not included. The award ordered one of the partners to receive all the good debts, and the settlement directed to be made between the partners was based upon the estimated amount of these good debts. A court of equity, in order to prevent the inequality which must otherwise result from the omission, made an order directing the receiving partner to account for what he had received from the good debts in excess of the amount at which they were estimated in the award.<sup>3</sup>

**The English Rule seems intrinsically just.** — It is difficult to find any fault with the intrinsic justice of the English rule, especially as relaxed by the decisions in equity, opening the door to redress in cases of honest and pardonable oversight. In cases not falling within the benefit of this exception, the principle constitutes simply a strict holding of each party to his duty. If either has a demand which he is bound by his undertaking of submission to present before the arbitrators,

<sup>1</sup> Russell on Arb., 3d ed. p. 479; *Jones v. Bennett*, 1 Bro. P. C. 528.

<sup>2</sup> *Brophy v. Holmes*, 2 Molloy, 1. See *post*, *Robinson v. Morse*, 26 Vt. 392, where the same exception for cases of accidental omission is recognized.

<sup>3</sup> *Spencer v. Spencer*, 2 Younge & Jer. 249.

and to have forever quieted by them, he must fulfil this obligation of presentment, or else forfeit his future right to revive the same claim. There is no reason why this should not be so. If, after he has presented the demand, the arbitrators refuse to hear or neglect to determine it, he can have the award vacated by reason of their omission.

**The Rule of Conclusiveness as to Matters omitted, in New York.** — The courts of the State of New York show a decided inclination to adopt the English rule. Accordingly we find it declared by them that under a general submission of all demands which either party has against the other, “neither party is at liberty to withhold a demand from the cognizance of the arbitrators, and then to sue for it.” As to any demand so withheld, the award is a bar.<sup>1</sup> And again, it was said: “An award is conclusive as to all matters to which the submission extends, whether any particular matter included in the submission was laid before the arbitrators or not.”<sup>2</sup> Thus, if a submission be made by two persons as party of the one part, of all demands pending between them and the party of the other part, the award will be a bar as to both their joint and their individual claims against him, whether both these classes of demands have or have not been presented before the arbitrators and awarded upon.<sup>3</sup>

And again: “An award made under a general submission is final as to matters within the submission, although not brought to the notice of the arbitrator nor embraced in his award. The parties are bound to claim before the arbitrator all demands coming within the scope of the submission; and if they fail to do so, they will be concluded from ever after asserting such demands.”<sup>4</sup>

Though in a case in which there was no occasion for going

<sup>1</sup> *Wheeler v. Van Houten*, 12 Johns. 311.

<sup>2</sup> *Fidler v. Cooper*, 19 Wend. 285.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ott v. Schroepel*, 1 Seld. 482 (*per* Paige, J., at p. 486), in the Court of Appeals, 1851.

so far, the court contented itself with remarking only that an award operates as a bar to a suit upon any cause of action determined and disposed of by the award.<sup>1</sup>

**The Rule in New York where the Scope of the Submission is doubtful.**— And a very sensible relaxation of the extreme strictness of the doctrine is presented by the following ruling: that where it is open to doubt whether or not a certain demand was properly included in a submission, if it is shown that it was not placed before the arbitrators by either party, and therefore, of course, was not included in the award, the presumption will be that it was not within the scope of the submission. The case was presented by a submission entered into between three partners to settle the terms of dissolution of the partnership. A note given by two of the partners to the third during the partnership was not presented to the arbitrators or awarded upon. It might or it might not have been a transaction in the course of the partnership business. There was no evidence going to show that it was such a transaction, and the court applied the foregoing rule of favorable intendment.<sup>2</sup>

**The Rule in Connecticut.**— The reports of Connecticut present us only with the following case, which hardly reaches the point of fully sustaining the English rule as an abstract proposition of universal application, though applying it in the special instance. A submission of all “accounts” had been made, and an award had been rendered. The plaintiff in this suit had exhibited to the arbitrators a part of his books to be adjusted; but he now sued to recover for certain charges contained in the books, but not actually laid before the arbitrators and awarded upon. The court held that he was precluded from doing so. The word “accounts” included these book accounts, and the award therefore operated as a settlement of them all. Otherwise it would be necessary to try not only the question of the validity of these items, but also the further issue, viz., whether or not

<sup>1</sup> *Coleman v. Wade*, 2 Seld. 44.

<sup>2</sup> *Harris v. Wilson*, 1 Wend. 511.

they had been considered by the arbitrators in coming to their conclusion. "This would be to make arbitrations an instrument not to diminish but to increase litigation."<sup>1</sup>

**The Rule in Vermont.**—In Vermont an award following a submission by deed is held to operate as a bar as to every matter included in the submission, but intentionally withheld from presentation before the arbitrators.<sup>2</sup> Though it is intimated, in the case cited, that if the non-presentment arose from mistake, forgetfulness, or accident, these facts might in some circumstances create an exception to the general rule. Whether or not the principle enunciated in this decision would apply in cases where the submission is by parol, the court does not decide; saying only that it was so applied by the court in New York,<sup>3</sup> but that, on the other hand, the judges had refused to apply it in an early decision in Vermont. Therein they expressed some doubts as to the propriety of applying the rule at all, for it was to be presumed that if a disputant omitted to present a demand, he did so from forgetfulness or mistake, and not from design, and he should not be held to suffer so severely for such a blunder. Coming down to the precise facts under consideration, it was added that "there is some danger from this doctrine as applied to parol submissions. Parol testimony of a submission and award may bar a claim that is just, and ought not to be barred, and this through a misapprehension or forgetfulness of the exact expressions used in the parol submission. They might say all demands when they intended all then exhibited and no others. Awards upon parol submissions of all demands are in some degree parallel with general receipts in full of all demands. Both are very frequently effected without the aid of counsel and without sufficient knowledge of consequences to excite a prudent caution before all is closed. We are not at present inclined to open

<sup>1</sup> *Bunnell v. Pinto*, 4 Conn. 431.

<sup>2</sup> *Robinson v. Morse*, 26 Vt. 392.

<sup>3</sup> *Wheeler v. Van Houten*, 12 Johns. 311, *ante*, p. 495.

the door to go back of written submissions and references that are general, and the awards general; but we admit the inquiry, whether adjudicated or not, in cases of submissions not in writing.”<sup>1</sup>

In another case arising in Vermont in 1850, Judge Redfield said: “An award will ordinarily have no greater effect than a judgment. It will only bar what is adjudged, — unless perhaps, if part of one entire transaction is submitted and adjudicated, it will bar other portions of the same transaction not presented before the court or arbitrators. Possibly, too, if a submission be general, of all demands, and under seal, and an award follow, it might be esteemed equal to a release under seal, or a covenant not to bring subsequent suits.” The submission in this case was of disagreements as to the management of a farm during the year past; and the adjudication and opinion substantially assert that if a certain class of accounts or items are submitted, the award will bar all, though only a portion are actually submitted and awarded upon; unless, indeed, it could be shown that the omitted items had been removed out of the scope of the arbitration by the joint consent of parties.<sup>2</sup>

Another Vermont case declares that an award, like a judgment, ordinarily operates as a bar concerning, and only concerning, the matters actually presented and disposed of by the adjudication. But if an account between the parties, consisting of several items, be submitted and passed upon, the award operates as a bar in respect of each individual item, although the presentation of some of them before the arbitrators has not been made. For the account must be regarded as an entirety.<sup>3</sup>

**The Rule in Maine.** — In Maine it has been held that if, under a general submission of all demands, there be some outstanding claim to which neither party attracts the attention of the

<sup>1</sup> *Buck v. Buck*, 2 Vt. 417.

<sup>2</sup> *Briggs v. Brewster*, 23 Vt. 100.

<sup>3</sup> *Ibid.*

arbitrators, and which accordingly they do not pass upon, suit may afterwards be brought upon it, and the award will not be pleadable in bar or estoppel.<sup>1</sup> The court in Maine went so far as to say that there was no question about this rule; an assertion showing considerable ignorance or contempt for the adjudications of many respectable tribunals. So held also if the arbitrators be requested to pass upon the claim, but refuse to do so.<sup>2</sup>

**The Rule in New Hampshire.**—In New Hampshire the court say that if an agreement be altogether broken by a neglect or refusal to submit any thing, no presumptions arise in bar of the demands; but an action lies on the agreement for such damage as may have been sustained by the breach. If the agreement be broken only in part, that is to say, by a neglect or refusal to submit or present a portion of the demands included within the scope of the submission, the same principle is said to prevail. The award would not operate as a bar in a subsequent suit concerning these omitted matters; but the party against whom they existed would have his right of action for damages suffered by him by reason of his adversary's partial breach of the contract of submission.<sup>3</sup>

**The Rule in Massachusetts.**—The tribunals of Massachusetts have departed most widely from the strict English rule. So early as 1809 the following cause arose: A. and B. entered into a statutory submission of "*all demands*" between them. An award was returned, and judgment entered thereon. Afterward A. was sued by C., the holder, under a blank indorsement, of a promissory note made by A., payable to the order of B. A. pleaded in bar the award and judgment. C. then offered to prove that the note was not presented before the arbitrators or included in the award. Chief Justice Parsons delivered the opinion of the court. He said that either party might prove what demands actually existed at the time of making the

<sup>1</sup> *Inhab. of N. Yarmouth v. Inhab. of Cumberland*, 6 Greenl. 21.

<sup>2</sup> *Bixby v. Whitney*, 5 Greenl. 192.

<sup>3</sup> *Whittemore v. Whittemore*, 2 N. H. 26.

agreement. "That a promissory note is a demand for certain purposes, cannot be denied, because a release of all demands would be a bar to an action upon it. Yet it may well be questioned whether a submission of all demands to arbitrators includes an acknowledged debt not in controversy, and concerning which there is no difference or dispute. If it is a fair construction of such a submission, that it includes all matters in *difference*, then either party may prove that a particular demand was not laid before the arbitrators, and so was not a matter in difference between the parties. But as either party *might* exhibit to the arbitrators, on the submission of all matters in difference, any personal demand he had on the other party, the presumption is that all demands were in fact submitted. But this presumption may be encountered by clear evidence that any particular demand was not laid before the referees. . . . But without deciding that an agreement to refer *all demands* is subject to the same construction as a submission of *all matters in difference*, it is manifest that an agreement to refer may not be executed; for the arbitrator may decline to take on himself the trust of arbitrating, or a party, where the rule is not *ex parte*, may refuse to appear before the referees. So a party may execute the agreement but in part, by omitting through accident or mistake to bring a particular demand, not in fact disputed, before the referees.<sup>1</sup> And although, when referees report upon all the demands submitted, the presumption is that all existing demands were submitted, yet evidence that a particular demand was not before the referees does not deny the agreement to refer all demands, but only proves the non-execution of that agreement in part. We are therefore satisfied that the testimony of D., that the note was not laid

<sup>1</sup> It should be observed that it cannot be gathered from the report or opinion that any refusal of an arbitrator or party, or any accident or mistake, was even asserted to have taken place. The inference is clear that no such allegation was advanced, or the court would obviously have rested its decision upon so satisfactory a basis. It seems that there was a simple, unexcused, and unexplained omission or neglect.



before the referees, nor by them taken into consideration, was properly received and submitted to the jury. . . . In the case before us a sum of money is reported in full of all demands, which must necessarily be confined to all demands that were submitted to the referees under the agreement to submit. For a report on demands not submitted would be void, as without the authority of the referees. Whether the demand on this note was or was not submitted, is therefore a question of fact to be settled, in order to decide on the legal operation of the judgment. . . . The presumption is that the demand on this note was submitted, because it was within the agreement of the parties to submit it, and we ought to presume that the parties have executed their agreement. By the evidence in the case this presumption is encountered ; for it appears that as to this note the agreement was not executed, and that the note was not brought before the arbitrators, who of course did not take it into their consideration. The report therefore does not include an award on the note, and the judgment cannot bind the parties beyond the award. . . . The justice of the case is unquestionably with the indorsee, and the law has wisely provided that the maker of the note shall not in this case intrench himself behind its forms against an act of substantial justice.”<sup>1</sup>

I have given the reasoning of the court in this cause in full because it seemed to me to be important to note the steps by which the court arrived at a conclusion at variance with that of the general force of adjudications in this country and in England. It may be noted that specific circumstances, such as that the matter was not in difference, or refusals to act, accident, and the like, which other courts regard as presenting good grounds for establishing exceptions to the operation of the general rule, are here presented as arguments against the establishment of that rule at all. And though the case actually before the court could not fairly be brought within the protection of any of these equitable conditions, it nevertheless received the

<sup>1</sup> Webster v. Lee, 5 Mass. 334.

full benefit of them by the resolute refusal to recognize the strict rule.

The result of this decision would manifestly be to allow a party to break his agreement of submission as to any claim which he secretly wished not to urge before the board of arbitrators without losing his right subsequently to enforce it. The only remedy of his opponent in such a case, provided at least that he could not show that the holding back was with deliberately malicious or fraudulent intent, as to which this opinion is silent, would be by an action for damages for breach of the contract of submission, a suit in which he could not often expect to recover back his actual outlay in prosecuting it, much less any adequate compensation for his vexation and trouble.

Accordingly, in a later case we find the court deliberately occupying precisely this inevitable position. A certain specified demand "and all other demands whatsoever" were submitted. A note of prior date to the agreement was shown by the award not to be included within it. The defendant offered to show that it was intended that the agreement should include the note, and that the plaintiff designedly withheld it. The evidence was excluded, and upon exceptions taken the Supreme Court held that it was rightly so excluded. For since the note was not in fact presented, the award "left the plaintiff's claim to payment of the note wholly unaffected by the submission and the proceedings under it. The defendant's remedy, if he has any, is by action against the plaintiff for breach of his agreement contained in the submission."<sup>1</sup> If the defendant had objected to the validity of the award, on the ground that the arbitrators had not passed upon all the matters submitted to them, perhaps the award might have been set aside. But that objection is not now open to him."<sup>2</sup>

<sup>1</sup> Citing *Webster v. Lee*, 5 Mass. 334; *King v. Savory*, 8 Cush. 312; *Bixby v. Whitney*, 5 Greenl. 196, stated *ante*, p. 499, and which does not go the length of sustaining the general rule; *Whittemore v. Whittemore*, 2 N. H. 26.

<sup>2</sup> *Edwards v. Stevens*, 1 Allen, 315 (1861).

But even the privilege of objecting to the award on such a ground seems to have been refused in the following case : Suit was brought on a promissory note. The defendant filed an account in set-off. The rule of court referred the said action and all demands. The award was that the plaintiff had not supported the demand made by him, and that the defendant should recover the costs of the reference, but not of the action. The court said, "*Non constat* that the defendant's account was ever laid before the referees. If it was not, they could not arbitrate upon it. The agreement of the parties, evidenced by the rule of the court, was then so far not executed ; and notwithstanding the general report of the referees, the defendant, if not otherwise precluded, may yet have his action upon the account filed by him, but on which the referees have not awarded." <sup>1</sup>

A. and B. entered into a submission of all demands. The award was rendered in favor of B. At the time of the submission A. was prosecuting certain actions against other persons, the subject-matter of which was not presented before the arbitrators nor considered by them. After rendition of the award the defendants in those actions prevailed by the aid of B.'s evidence to the purport that he was the party liable for the debts in suit. Thereupon A. sued B. for these demands, and B. pleaded the award. The court said that the question was, whether the award barred all causes of action between the parties, "irrespective of their peculiar circumstances, and where it can be shown by uncontroverted evidence that the claim was not submitted to the arbitrators and not acted upon by them. It is quite obvious from a recurrence to adjudicated cases that this is one of those mooted points where much may be found on both sides. Our own cases have shown a strong disposition not to give such effect to a general submission as would bar an honest demand not submitted to the arbitrators, where the omission to present the same was consistent with

<sup>1</sup> *Hodges v. Hodges*, 9 Mass. 320.

good faith, and not with a design to further litigation, or to change the forum for the trial of the same." After considering various irreconcilable rulings of different courts, the judge continues: "In this contrariety of views we, of course, give the preference to our own decisions as guides in this matter. With the qualification that the present case furnishes, of entire good faith in the plaintiff in omitting to present this claim to the arbitrators, and with the facts proved as to the proceedings in the suits pending against other parties, and with the further fact that the defendants did not, at the hearing before the referees, request any action on this matter, we are of opinion that it was competent to show" that the demand was not presented or acted upon at the arbitration, and it being further shown that the defendant was indebted to the plaintiff, as claimed, that the latter was entitled to a verdict.<sup>1</sup>

**Effect on the Rule of a Deliberate Refusal to present a Claim.**— If, however, a party is requested by his adversary to present a claim which is actually embraced in the submission, but he refuses to do so, even the courts in Massachusetts will hold this demand to be forever after barred by the award and judgment rendered thereon.<sup>2</sup>

**An Award not deciding the Controversy is no Bar.**— If the award does not determine the matter submitted, it may properly be considered that there is in fact no award at all, and there can, of course, be no bar. Thus an award declaring that the arbitrators "do not agree," and that each party pay a certain sum, by way of fees, to his own arbitrator, is no bar to a subsequent suit upon the cause of action, constituting the subject-matter of the submission.<sup>3</sup>

**Award under a Submission of Matters "in Difference."**— A submission of all matters *in difference* does not include a claim or demand, though then subsisting and matured, which is not the

<sup>1</sup> King v. Savory, 8 Cush. 309.

<sup>2</sup> Warfield v. Holbrook, 20 Pick. 531.

<sup>3</sup> Smith v. Holcomb, 99 Mass. 552.

subject of any dispute or controversy between the parties. Consequently an award made under such a submission does not operate as a bar in respect of such an existing but uncontroverted claim.<sup>1</sup>

The defendant, owing the plaintiff a sum of money for arrears of an annuity, gave him a *cognovit* for the same. He, however, disputed the plaintiff's claim to other sums claimed to be due on a partnership account between them. Upon the same day on which the *cognovit* was given, a submission was entered into between the parties of these matters of account and of all matters in dispute. No question concerning the arrears was raised before the arbitrators. The court held that the claim on the *cognovit* was not a matter in dispute at the time of the submission, and that the plaintiff was not precluded, either by the award in his favor or by his release in general terms of all demands executed in compliance with the orders of the award, from proceeding to enforce the *cognovit*.<sup>2</sup>

**The Award bars only the Precise Matter submitted.**—The award can operate as a bar in respect of no other questions save precisely those which are submitted.<sup>3</sup> For example, if the reference be of the amount of a demand, the award does not prevent the subsequent denial of the legality of the demand.<sup>4</sup> So where a verdict is found for the plaintiff, subject to a point of law, and leave is reserved to the defendant to move to enter a nonsuit, an award made pursuant to an agreement to submit to arbitration the question of the amount of damages, does not waive the matter of legal liability unless the defendant expressly consents to abandon it.<sup>5</sup>

**Pleading an Award in Bar to a Matter not disposed of by it.**—

<sup>1</sup> *Ravee v. Farmer*, 4 Term, 146; *Golightly v. Jellicoe*, ib. 147, n.; and see *Wheeler v. Van Houten*, 12 Johns. 311; *Fidler v. Cooper*, 19 Wend. 285; *Webster v. Lee*, 5 Mass. 334; *King v. Savory*, 8 Cush. 309; all previously stated at length in this chapter.

<sup>2</sup> *Upton v. Upton*, 1 Dowl. 400.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 480.

<sup>4</sup> *Steers v. Lashley*, 1 Esp. 166.

<sup>5</sup> *Oxenhan v. Lemon*, 2 Dowl. & Ry. 461.

If a party seeks to avail himself of an award as a bar to a demand not disposed of by it, it behooves him specifically to aver in his pleadings that the demand was included in the submission, and that it might have been settled in the award of the arbitrators had the demandant presented it before them for that purpose.<sup>1</sup>

**The Burden of Proof where an Award is pleaded in Bar.** — A suit was brought by the holder of a note indorsed in blank against the maker. The maker pleaded in bar an award made pursuant to a submission of all demands entered into between himself and the payee. Upon this evidence he proposed to rest his defence, contending that it was incumbent upon the plaintiff to show that he had purchased it from the payee prior to the date of the agreement of submission. But the court ruled otherwise, being of opinion that the defendant must prove that the agreement was made before the indorsement.<sup>2</sup>

**Whether a Party, not having performed his Part of the Award, can plead it in Bar.** — In New York the law has been laid down as follows: With regard to the matter of pleading an award in bar, a distinction formerly existed between the cases of verbal submission and of submission by bond. In the latter case the award was a bar before performance of his duties under it by the party seeking to avail himself of it in this manner; because the other party had his remedy to enforce such performance. Before it was settled that *assumpsit* would lie upon mutual promises if the submission was not by deed, it was necessary for the party who undertook to plead an award in bar to allege performance of the matters required of him by the award. But since the abandonment of these old distinctions, it is said that "there is scarcely a case that can arise" where performance must be pleaded.<sup>3</sup> Cases in other

<sup>1</sup> Robinson v. Morse, 26 Vt. 392, at p. 395.

<sup>2</sup> Webster v. Lee, 5 Mass. 334.

<sup>3</sup> Armstrong v. Masten, 11 Johns. 189, citing the English cases, Parsloe v. Bailey, 1 Salk. 76; Allen v. Harris, 1 Ld. Raym. 122; Case v. Barber, T. Raym. 450.

States also declare that a tender of performance need not be averred except in cases where the award is made conditional upon the performance of certain acts by the party claiming the benefit of it.<sup>1</sup>

**A Condition Precedent must be performed before an Award is a Bar.**— If an award embodies a finding in favor of a certain party, subject, however, to an express requirement, in the nature of a condition precedent, that he shall first do a certain specified act, he can avail himself of the award as a bar only after he has performed that act.

An award gave certain lands to the defendants upon condition that they should within six months execute certain releases to the Commonwealth. In an information for intrusion upon said lands, brought by the Attorney-General on behalf of the Commonwealth, the defendants pleaded the award in bar. The replication alleged that the six months had elapsed, and the releases had not been executed. The court held that the plea in bar was bad; the requirement for the execution of the releases was in the nature of a consideration; and, having failed to perform it, the defendants could not reap the benefit which they were entitled to only by virtue of such performance.<sup>2</sup>

**An Award is pleadable in Bar to a Bill in Equity.**— The award itself may be pleaded in bar to a bill in equity brought to set aside the award and open the account.<sup>3</sup> A plea of an award is good not only as to the merits of the case, but also as to the discovery sought by the bill. For the respondent is not obliged to set out the whole account between himself and the complainant after an award has been rendered in his favor concerning that very account. The award must be treated as conclusive upon all parties till an error is shown in taking the account, or partiality or misconduct on the part of the arbitrator.<sup>4</sup>

<sup>1</sup> *Duren v. Getchell*, 55 Me. 241; *Girdler v. Carter*, 47 N. H. 305; *Varney v. Brewster*, 14 id. 49; *Curlew v. Dean*, 4 Conn. 259.

<sup>2</sup> *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 399.

<sup>3</sup> *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Farrington v. Chute*, 1 Vern. 72.

<sup>4</sup> *Russell on Arb.*, 3d ed. pp. 552, 553; *Tittenson v. Peat*, 3 Atk. 529.

Russell further says that where, after the bill has been filed, an agreement to refer the subject-matter thereof to arbitration is entered into, it is not fully decided whether the award made pursuant to this agreement can be set up in bar to the bill itself by plea put in, in the nature of a *puis darrein continuance* at law.<sup>1</sup> In *Rowe v. Wood*,<sup>2</sup> Lord Eldon, after much consideration of the question, seems to incline towards the negative, and to be of opinion that the award ought not to be allowed to be thus availed of; especially inasmuch as the purpose might be much more effectually obtained by a motion to stay proceedings in the cause. Later, in *Dryden v. Robinson*,<sup>3</sup> the same question was again raised. The marginal note gives it as the ruling of the court that the award may be pleaded; though no authority for such a statement is furnished by the published report of the cause. After the bill was filed, an agreement to refer the subject-matter of the suit had been entered into between some of the parties, and an award was made. But inasmuch as all the parties to the suit were not parties to the agreement to refer, although the plaintiff in the bill was such party; and, further, inasmuch as a part of the prayer of the bill was for the execution of the trusts of a deed under which some persons, parties to the suit but not to the submission, were interested, therefore the court ordered that the plea of the award should stand for an answer, with liberty to except. This latter case is therefore not regarded as an authority counter to that of *Rowe v. Wood*. Though, adds Mr. Russell, it should be observed that in *Rowe v. Wood* there was only an agreement pleaded, some of the terms of which were to be settled by arbitration; but the making of an award was not averred.

**Pleading an Award in Set-off.** — Like any other matured and liquidated demand, an unconditional award ordering the pay-

<sup>1</sup> Russell on Arb., 3d ed. p. 553.. See the statement, *post*, in this chapter, of the case of *Elliot v. Heath*, 14 N. H. 131.

<sup>2</sup> 1 Jac. & Walk. 315; 2 Bligh P. C. 595.

<sup>3</sup> 2 Sim. & St. 529.



ment of a sum of money may be availed of by the creditor by way of set-off in a suit brought against him by the debtor. But an award cannot be availed of in set-off if it has been made subsequently to the inception of the suit, even although the demand allowed by it was in existence prior to the date of the suit. This is on the principle that the original claim is merged in the award, which becomes a new and distinct cause of action, and was not subsisting in such shape that an action could have been sustained upon it at the time when the suit was begun.<sup>1</sup>

**Operation of an Award to vest the Title to Personalty.**—Where the ownership of personal property is in dispute, or where the arbitrators have power to determine or dispose of the ownership, the operation of the award to vest title will depend in a great measure upon the language used. If the award simply declares, in substance, that the party who is in present possession under a claim of right is the lawful owner, and shall continue to hold and possess the same, no difficulty can arise. The award is a sufficient confirmation of title in the gaining party, at least so far as concerns the other parties to the submission. But the difficulty, such as there is, arises when the award undertakes to change either title or possession. It seems that if the award purports in direct terms to give to a party a certain thing on a day certain, the title will vest in such party on such day, without any action upon the part of himself or of the party in possession. But if the award orders that on a certain day, or upon performance of a certain act, delivery of a chattel shall be made to one party by the other, the delivery is an essential preliminary, without which title does not vest. And even though performance of the act required to be done in the nature of a condition precedent or consideration be prevented by the active or passive refusal of the party to whose benefit it looks, still the title cannot for this reason vest without the delivery.

An award was that "M. is to have the cow and calf on the

<sup>1</sup> Varney v. Brewster, 14 N. H. 49.

first of April." The court distinguished this case from *Hunter v. Rice*,<sup>1</sup> because in that case a delivery was ordered to be made upon receipt of a certain payment. But in this instance "the award purports to give the title to the cow and calf to the landlord without any act remaining to be done by the tenant, and we are of the opinion that the award must be regarded as conclusive evidence of title in the landlord."<sup>2</sup> Further, commenting on *Hunter v. Rice*, the court said that there, if the party to deliver the chattel had received the money, his receipt would have constituted an assent, and the title to the chattel would have passed. "It would seem, however, to be well established, that the effect of an award does not depend upon a subsequent assent, but upon the contract of submission; and that after the award is made it is too late to revoke the submission or to repudiate the award. Since the decision in *Rice v. Hunter*, the law upon this subject has undergone considerable change, and it is not certain that the views there adopted would not be modified."

The case of *Hunter v. Rice*,<sup>3</sup> mentioned in the last paragraph, is a leading English case. An award ordered that a tenant should, upon a certain day, deliver up to his landlord a stack of hay, upon being paid or allowed a certain sum in satisfaction. It was held that the title in the hay did not pass, by virtue of the award, to the landlord, on his tender of the money, the tenant refusing to assent or to accept the money and deliver up the hay; and that therefore the landlord could not bring trover for it, but that his only remedy was by suit upon the award. Though it was said that an acceptance of the money by the tenant would have been operative as a ratification of the award and an assent to the transfer of the property.

**An Award as to Chattels of the Wife is a Reduction into Pos-**

<sup>1</sup> 15 East, 100.

<sup>2</sup> *Girdler v. Carter*, 47 N. H. 305 (1867).

<sup>3</sup> 15 East, 100.

**session.**—If a husband enters into a submission in respect of chattels, real or personal, claimed in right of his wife, the award will operate as a sort of judgment, and will constitute a reduction of them into possession on his part.<sup>1</sup>

**Operation of an Award upon the Title to Real Estate.**—The rule has long been established, both in the United States and in England, that an award is inoperative for the purpose of actually passing the title to land.<sup>2</sup> Even if the object be only to effect a partition between tenants in common, no title will pass unless conveyances be exchanged.<sup>3</sup> Such effect as the award has, it has solely by way of estoppel. It is good only as between the parties to the submission. Even as between them it does not transfer title; but the party who loses under the decision is simply estopped afterward to deny the superiority of his adversary's title to his own.<sup>4</sup>

The award is not in itself affirmative "evidence of title," but is available to prevent the losing party from setting up title.<sup>5</sup>

In an old case it was said that if a dispute be between two respecting the title to a lease of land for years, and they submit the controversy to arbitration, and the arbitrator awards that one shall have the land, or shall have the term, this is a good gift of the interest in the term. But if the award be that one shall permit the other to enjoy the term, this is no good

<sup>1</sup> Russell on Arb., 3d ed. pp. 18, 481; citing Williams on Executors, pp. 538, 687; Rolle's Abr. Arb., 245, D.; Roper on Husband and Wife, 2d ed. vol. i. pp. 185, 219; Hunter v. Rice, 15 East, 100; Oglander v. Baston, 1 Vern. 396.

<sup>2</sup> Lellick v. Addams, 15 Johns. 197; Cox v. Jagger, 2 Cow. 638, at p. 650; Jackson v. Gager, 5 Cow. 383; Shelton v. Alcox, 11 Conn. 240; Shepherd v. Ryers, 15 Johns. 497; Girdler v. Carter, 47 N. H. 305; Gray v. Berry, 9 N. H. 473; Page v. Foster, 7 N. H. 392; Goodridge v. Dustin, 5 Metc. (Mass.) 363, overruling, so far as necessary, the case of Whitney v. Holmes, 15 Mass. 152; Calhoun's Lessee v. Dunning, 4 Dall. 120; Russell on Arb., 3d ed. p. 481; Rolle Abr. Arb., A.; Marks v. Marriott, 1 Ld. Raym. 114; Smalley v. Blackburn Railway Company, 2 Hurl. & Nor. 158; 27 L. J. Exch. 65; Henry v. Kirwan, 9 Ir. C. L. 459; Doe d. Morris v. Rosser, 3 East, 15, stated post.

<sup>3</sup> Johnson v. Wilson, Willes, 248.

<sup>4</sup> See the cases cited in note 2, ante.

<sup>5</sup> Jackson v. Gager, 5 Cow. 383.

gift of the interest in it.<sup>1</sup> In commenting upon this case, Russell says that it seems in effect only to show that the award is conclusive as between the parties on a question of disputed title, not that it has power to transfer the right from one to the other.

An action between the owner of land, and a party holding the same by his permission, but claiming to hold as bailiff and not as tenant, was submitted to an arbitrator, to determine what should be done by the parties concerning the land. His award was that the party in possession held as a tenant; that the tenancy should cease upon the delivery of the award; and that one month afterward possession of the land should be delivered up to the owner. On an issue between the landlord and an execution creditor of the tenant, whether the crops growing on the land were or were not the property of the tenant, the crops having been seized by the creditor after delivery of the award, but before the expiration of the month, it was held that the award had not the effect of transferring to the landlord the property in the land, or in the growing crops which would have passed with the land.<sup>2</sup>

**An Award of Commissioners under a Statute may pass Title.** — It has been held in England, in some cases, that an award of arbitrators or commissioners, made in pursuance of acts of Parliament or public statutes, may have the effect of transferring title, even to real estate.<sup>3</sup> As a general rule the title does not pass before the award has been actually made.<sup>4</sup> But in some instances special provisos have the effect of transferring it at earlier stages in the proceedings.<sup>5</sup>

<sup>1</sup> *Trusloe v. Yewre*, Cro. Eliz. 223; 2 Leon. 104.

<sup>2</sup> *Thorpe v. Eyre*, 1 Ad. & El. 926.

<sup>3</sup> Russell on Arb., 3d ed. pp. 484, 485; *Farrer v. Billing*, 2 Barn. & Ald. 171; *Greathead v. Morley*, 3 Man. & Gr. 139; *Ellis v. Arnison*, 5 Barn. & Ald. 47; *Johnson v. Hodgson*, 8 East, 38.

<sup>4</sup> See the cases cited in the last note; also *Cator v. The Croydon Canal Company*, 4 Younge & Coll. 405.

<sup>5</sup> *Doe d. Harris v. Saunder*, 5 Ad. & El. 664; *Kingsley v. Young*, 17 Ves. Jr. 468; 18 id. 207; *Doe d. Duke of Beaufort v. Neeld*, 3 Man. & Gr. 271.

**An Award finding Title to Realty will sustain an Action in Ejectment.** — A valid award of arbitrators settling the title to real estate is a sufficient basis for the prevailing party therein to sustain an action of ejectment against his adversary.<sup>1</sup>

In an action of ejectment an award was rendered, determining the right and ordering the land to be delivered up to the lessor of the plaintiff. In a second action of ejectment between the same parties, this award was held to be conclusive in favor of the plaintiff's claim. In the opinion it was said, in explanation of the effect of the award, that it could not operate to convey the land; but that there was no reason why the defendant might not conclude himself by agreement from disputing the title of the lessor in ejectment; and that as the parties had consented that the award should be conclusive as to the right to the land, that was sufficient to bind them in the action of ejectment.<sup>2</sup> Patterson, J., commenting upon this case, in *Thorpe v. Eyre*,<sup>3</sup> said that the effect of the award in *Doe d. Morris v. Rosser* was, that the land *had always been* the property of the claimant; but that in the case before him the award declared the property in the land, so far as the possession during the term was concerned, to be in the tenant. And he asked: "Is there any instance in which an award has been held to *transfer* property?"

**Operation of Awards determining Boundary Lines.** — It is obvious that an award which undertakes to settle a disputed boundary line between two adjoining estates must in some degree constitute a decision upon a question of title. Accordingly, we find it sometimes treated like any other award passing upon the title to real estate; and the rules already laid down are in such instances adopted. Thus, in New York and Vermont, it is held that the operation of an award

<sup>1</sup> *Lellick v. Addams*, 15 Johns. 197; *Jackson ex dem. Stanton v. De Long*, 9 Johns. 43; and see *Cox v. Jagger*, 2 Cow. 638, at p. 650; and see *ante*, in this chapter, the paragraph An Award in Evidence is conclusive.

<sup>2</sup> *Doe d. Morris v. Rosser*, 3 East, 15.

<sup>3</sup> 1 Ad. & El. 926.

determining a boundary line, is to estop the parties from afterwards denying that this is in fact the line of division between them.<sup>1</sup>

An action of trespass *quare clausum fregit* was referred by rule of court, wherein it was stipulated that the referees should "settle the division line between the *locus in quo* and the land of the defendant." The award, in which the boundary line was determined, was accepted, and judgment rendered thereon by the court. In a subsequent action between the same parties, the demandant set up and relied upon this award; but this was objected to on the ground that it could not operate as a conveyance of land. But the objection was overruled. The court said that the award, thus accepted and recorded, was equally valid and conclusive with a verdict founded on the same facts distinctly put in issue between the parties; and a judgment on an award made and recorded is a good bar to another action founded on the same fact or title. The following interesting reasoning was added: "Without intending to controvert the position that land cannot be conveyed by the mere determination of arbitrators, and that estates can only be passed by deed, yet we think a just distinction may be made between questions of title and those of boundary, though the one may occasionally be involved in the other. In the matter of boundary the question is, which is the true line of division between adjoining estates, and the removing of the uncertainty attending the settling of the line can as well be done by an arbitration and award as by deed; and the effect of such a judgment is not to change the titles to a portion of the respective estates, but to confirm each in his own estate; and by such award the parties shall be concluded as to their boundaries." Further on in the opinion the court say that an award, though not competent to convey land, yet concludes the parties from disputing the title or boundary, and operates by way of estoppel.<sup>2</sup>

<sup>1</sup> *Stewart v. Cass*, 16 Vt. 663; *Robertson v. McNeil*, 12 Wend. 578.

<sup>2</sup> *Goodridge v. Dustin*, 5 Metc. (Mass.) 368.

In the later case of *Searle v. Abbe*,<sup>1</sup> a similar doctrine was enunciated under similar circumstances. The court said that land could not be “transferred by an award and judgment thereon, but that the parties to the submission were thereby estopped to dispute the title or boundary which is distinctly settled by the award. The arbitrators, in this case, did not make new boundaries, nor change old ones; they merely found where the pre-existing boundaries were. As was said by James Otis, *arguendo*, and affirmed by the decision of the Superior Court of Judicature of the Province of Massachusetts Bay, almost one hundred years ago, in a case<sup>2</sup> in which arbitrators had determined a boundary line, without ordering a release of the land on either side, ‘I grant the award to be void if the arbitrators have determined the freehold. But here they have not; they have only determined the line; the settling that does not affect the freehold.’”

Similar language was used in an action in ejectment by the court in New York concerning a submission of a dispute in relation to boundary lines. The object of the submission was said to be to ascertain and settle the true location of a particular lot. “It was then an agreement that the arbitrators named should determine the boundaries of the common lot, according to the description in the partition deed of the patent under which both parties derived their title. *The title to the common lot was not in question.*” Upon the strength of this reasoning a parol submission, and an award pursuant thereto determining a boundary, were held to be valid and binding upon the parties.<sup>3</sup>

**An Award finding Title or settling a Boundary Line is a Defence in Trespass.**—There being a dispute between A. and B., owners of adjoining land, as to the boundary line between them, they submitted the matter, and an award was made. A. entered and

<sup>1</sup> 13 Gray, 409.

<sup>2</sup> *Rogers v. Kenwick*, Quincy, 63, 64.

<sup>3</sup> *Jackson v. Gager*, 5 Cow. 383.

cut timber upon his side of the line thus established. B. sued him in trespass *quare clausum fregit*. Held, that the award furnished a sufficient defence for A.<sup>1</sup>

So, also, it has been held in Connecticut, that a valid award, finding the title to realty, is a good and available defence in an action of trespass *quare clausum* brought by one party to the submission against an assignee of the other party.<sup>2</sup>

**An Award finding Title not under Seal, will operate by Way of Estoppel.**—In a case in Connecticut a submission and award finding title to realty were both in writing, but neither of them was under seal. It was objected that there was no estoppel, since that could be effected only by an instrument under seal. But the court overruled the objection, saying that an estoppel might arise out of acts *in pais*. Here the parties had agreed to be bound by the final decision of the arbitrators, pursuant to which agreement the arbitrators had met and awarded. The estoppel was complete.<sup>3</sup>

**Operation of an Oral Award concerning a Boundary Line.**—As a general rule every submission and award concerning the title to real estate or a boundary line ought to be put in writing.<sup>4</sup> As concerns the title to real estate this principle is imperative and without exception. As concerns the matter of boundary lines it has been less rigidly enforced, and oral awards have been upheld after they have been accepted and acted upon by the parties. Thus in New Hampshire a number of decisions have declared that after the award concerning a boundary line has once been made, and the line has actually been run, it makes no difference whether the submission and award, either or both, were in writing or oral. The award will be final and conclusive in either case.<sup>5</sup>

<sup>1</sup> *Lellick v. Addams*, 15 Johns. 197.

<sup>2</sup> *Shelton v. Alcox*, 11 Conn. 240.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ante*, pp. 51, 257, 258.

<sup>5</sup> *Jones v. Dewey*, 17 N. H. 596; *Sawyer v. Fellows*, 6 id. 107; *Orr v. Hadley*, 36 id. 575; *Eaton v. Rice*, 8 id. 378; *Furber v. Chamberlain*, 29 id. 405; and see *Gray v. Berry*, 9 N. H. 473.



So, likewise, in an old case in New York it was held that if the parties, without any writing between them, employed a surveyor to run their boundary line, and accepted his line after he had run it, as being satisfactory, they would thereafter be bound by it. Though the parol agreement could at any time before execution be annulled, waived, or altered by parol.<sup>1</sup>

In Maine it is said that an oral award concerning a boundary line is inoperative, for the reason that "the title to real estate cannot be affected by any agreement or award not in writing."<sup>2</sup> Though after long acquiescence in such an award by the parties it will thereafter be regarded as final and conclusive.<sup>3</sup> But precisely the contrary doctrine has been asserted in New York, where a parol submission and award concerning a boundary line were upheld on the ground that the *title* to the land was not in dispute.<sup>4</sup>

**An Oral Award under an Oral Submission concerning a Boundary Line is Competent Evidence.** — The action was in tort in the nature of trespass *quare clausum fregit*, and was referred to an arbitrator under a rule of court. The case turned upon the title, which depended upon a question of boundary. The defendant offered evidence of a previous oral submission of the disputed boundary and of an oral award made pursuant thereto. The arbitrator admitted the evidence, against the objection of the plaintiff. The court, after a careful review of the cases, held that the admission was proper. "An agreement of the parties, verbal or written, though not effective as a conveyance, is *evidence* of the true location of lines or monuments. And there seems to be no good reason why a fact which parties can lawfully agree on for themselves, may not, by their consent, be determined for them by arbitrators, with the same effect as if they had agreed to it without such assist-

<sup>1</sup> Jackson ex dem. Nellis v. Dysling, 2 Caines, 198.

<sup>2</sup> Philbrick v. Preble, 18 Maine, 255.

<sup>3</sup> Gove v. Richardson, 4 Greenl. 327.

<sup>4</sup> Jackson v. Gager, 5 Cow. 383, stated *ante*, p. 515.

ance. When the award is made, the agreement is executed, and becomes operative.<sup>1</sup>

**Estoppel by an Award need not always be pleaded.**—A. sued B. in trespass. B. justified by asserting title under C. At the trial he offered to show that by a submission and award between A. and C. wherein the finding was in favor of C. the plaintiff was estopped to deny C.'s title. The court said that estoppel could not be availed of unless it had been pleaded, provided that the party had had opportunity to plead it; but if he had not had such opportunity, he could show the fact in evidence. In this case they considered that no such opportunity had been properly afforded, and the award was allowed to be introduced in evidence.<sup>2</sup>

**Operation of an Award simply finding Title.**—If the arbitrators wish to pass title from one party to the other, since the award will not *per se* effect this, they should order that a deed be executed and delivered. The order for a deed must be specific; for the simple finding that one of the parties is entitled to certain land held or claimed by the other, does not constitute a sufficient basis for demanding and compelling a deed.<sup>3</sup>

**Operation of an apparently Inadequate Award.**—That arbitrators appear not to have provided sufficient means, though intending to do so, for giving effect to some portion of their award, seems to furnish no cause for avoiding it. The error is one of discretion, and is not regarded as constituting a proper subject for revision by the courts. The award will remain as a good and valid award, operative so far as its provisions will permit, and of course no farther.

Thus where arbitrators awarded that a certain sum of money should be paid, and undertook to provide security for such payment, the inadequacy of the security, or the existence of legal

<sup>1</sup> Byam v. Robbins, 6 Allen, 63.

<sup>2</sup> Shelton v. Alcox, 11 Conn. 240.

<sup>3</sup> Loring v. Whittemore, 13 Gray, 228.

obstacles in the way of enforcing it, was held not to invalidate the award. It remained good and enforceable as an award for the payment of the sum named and for the giving of the security designated.<sup>1</sup>

**An Award is inoperative as to Strangers.**—As a general rule an award can, of course, be enforced neither by nor against one who is a stranger to the submission.<sup>2</sup> Neither can a stranger avail himself of it as a defence.<sup>3</sup>

**An Award is inadmissible in Evidence against a Stranger.**—By parity of reasoning an award must, as a general rule, be inadmissible in evidence against one who is no party to the submission and not within the jurisdiction of the arbitrator. The rule is “laid down as universal,” says Russell, that an award has no force in evidence as against strangers to the submission.<sup>4</sup>

Where A. and B., owners of adjoining lots of land, agreed to submit a question concerning the boundary line, and before the decision of the referees A. conveyed his parcel to C. without notice of the agreement, it was held that the award was not competent as evidence in a suit between C. and B. C. had not assented in any way to the doings of the referees, and had not even been notified thereof.<sup>5</sup> Though the mere fact of notice, without assent, could not supposably have been of any avail.

Efforts have sometimes been made to introduce awards as evidence against persons not parties to the submission, under the guise of evidence of general reputation. But no instance is recorded in which the attempt has been successful.<sup>6</sup>

<sup>1</sup> *Cox v. Jagger*, 2 Cow. 638.

<sup>2</sup> *Thompson v. Noel*, 1 Atk. 60.

<sup>3</sup> *Davis v. Rea*, Cas. temp. Finch, 441.

<sup>4</sup> Russell on Arb., 3d ed. p. 537; *Evans v. Rees*, 10 Ad. & El. 151; *Doe d. Smith v. Webber*, 1 id. 119; *Lady Wenman v. Mackenzie*, 5 El. & Bl. 447; 25 L. J. Q. B. 44.

<sup>5</sup> *Emery v. Fowler*, 38 Maine, 99.

<sup>6</sup> *Rex v. Cotton*, 3 Camp. 444; *Lady Wenman v. Mackenzie*, 5 El. & Bl. 447; 25 L. J. Q. B. 44; *Evans v. Rees*, 10 Ad. & El. 151; *Brett v. Beales*, 1 Moo. & M. 416.

**An Award may sometimes be Competent Evidence for a Stranger.** — Though the rule is so rigid that an award can never be availed of in evidence against a person who is a stranger to the submission and without the jurisdiction of the arbitrators, yet it occasionally happens that such a person may be allowed to introduce an award as evidence in his own behalf.<sup>1</sup>

An action was instituted against a servant of the East India Company to recover damages for false imprisonment. The defendant was allowed to introduce, in mitigation of damages, under the general issue, a release given by the plaintiff to the company in fulfilment of an award made pursuant to a submission between the plaintiff and the company, by which award there was given to the plaintiff a large sum in compensation for injuries done him by servants of the company and especially by the defendant; the matters submitted in terms comprehended the claim which was the basis of this action.<sup>2</sup>

If a chattel, the right to possession of which is in dispute, be deposited with the arbitrator, an award finding that it is the property of one party will prevent the other from maintaining trover against the arbitrator for refusing to deliver it to him; since the award is evidence that the withholding is no illegal conversion.<sup>3</sup>

An award which has been acted upon may sometimes be available in evidence for a stranger to the submission.<sup>4</sup>

An award was made between two parties, both claiming certain land by rights paramount to a lease which had been made thereof, and the award was notified to tenant of the land. He subsequently attorned and paid rent to the party in whose favor the award was made. *Held*, upon proof of these facts, that he became tenant to that party from year to year.<sup>5</sup>

On an issue as to the title to some growing crops seized by a

<sup>1</sup> Russell on Arb., 3d ed. p. 539.

<sup>2</sup> *Shelling v. Farmer*, 1 Strange, 646.

<sup>3</sup> *Gunton v. Nurse*, 5 Moore, 259.

<sup>4</sup> Russell on Arb., 3d ed. p. 539; *Downs v. Cooper*, 2 Q. B. 256.

<sup>5</sup> *Doe d. Chawner v. Boulter*, 6 Ad. & El. 675.

creditor of the tenant of the land, an award between the landlord and tenant, ordering that the tenancy should cease and the tenant deliver up possession, was held admissible in evidence, though impotent of itself to transfer to the landlord the property in the crops.<sup>1</sup>

**A Stranger may by his own Act bring himself within the Operation of an Award.** — An exception to the general rule has been allowed to obtain where a stranger has made himself practically a party to the award by accepting from others the performance of acts required by the award to be done by them for his benefit, and by himself performing acts which he is required by the award to do. Thereafter he will be bound by it, and will be estopped from making any averment against it except upon discovery of manifest mistake or fraud.

It was proposed among the heirs of a deceased person to settle and distribute his estate according to an award of arbitrators. The agreement to this effect was signed by all the heirs except one. An award was rendered, and distribution was made according to it, and this heir accepted and received the amount awarded to him. The court held that he thereby brought himself within the operation of the award, and became bound by it, and was estopped to aver any thing against it, unless upon the discovery of manifest mistake or fraud.<sup>2</sup>

**A Stranger cognizant of the Submission may be within the Operation of the Award.** — A case in which a stranger to the submission in the technical sense of not being a party to it was yet held bound by the award, occurs in the New York reports. He was about to enter into possession of a house as tenant. G. and R. disputed as to which had the right to let it to him, and to receive the rent. In his presence they agreed to submit the matter. After the award the successful party sued H. for rent. H. defended on the ground of want of notice of the award. The court said that the question of notice to him did not arise ; “ he

<sup>1</sup> Thorpe v. Eyre, 1 Ad. & El. 926.

<sup>2</sup> George v. Johnson, 45 N. H. 456.

was bound to take notice of the award at his péril, for he was present when it was submitted to the arbitrators to determine to whom he should pay the rent, and it was in proof that he was privy to the submission, and the conclusion is irresistible that it was so referred with his approbation. The parties claiming respectively the right to let interpleaded, as it were, in his presence, and agreed to refer the question to the arbitrators ; and he entered into possession with the knowledge of that interpleader and submission at the time it took place.”<sup>1</sup>

**Parties are bound though the Award concerns the Rights of a Stranger.** — The parties to a suit at law submitted the subject-matter thereof, and included also in their submission another distinct matter which affected the rights of a third person, not a party to the suit or submission, and in no way within the jurisdiction of the arbitrators. It was held that so far as the rights of the parties were determined and disposed of by the award, it was conclusive between them, whatever effect it might have, or whether any at all, on the rights of the stranger. The award having been rendered in favor of the defendant, it operated as a bar to the further prosecution of the action.<sup>2</sup>

**Operation as to Sureties of an Award extending Time for a Principal Debtor.** — An award extending the time of payment between a principal debtor and his creditor operates to discharge the debtor's sureties who are not parties to the arbitration.

A lessee furnished sureties upon his lease for the prompt payment of the rent. Afterward the lessor and lessee entered into a submission, in pursuance of which an award was made, ordering that the lessee should, on or before *the tenth day of November* next, pay a certain sum to the lessor in full of all rent to *the first day of August* past, and of all damages to the time of the submission. In suit against the sureties they were held to be discharged by reason of this award. The court said : “ The difference between a judgment and an arbitrament and award,

<sup>1</sup> *Humphreys v. Gardner*, 11 Johns. 61.

<sup>2</sup> *Sears v. Vincent*, 8 Allen, 507.

so far as the rights of a surety are concerned, is great. If the surety pays the debt after a judgment is recovered, his right of subrogation gives him the judgment, and thereby the means of enforcing payment at once from the property of the original debtor. But if he pays after the award, his right of subrogation gives him only the legal remedies for the enforcement of it; whereas by his contract he would be entitled to all the remedies the law gives on the lease. The effect, therefore, of the submission and award is to change the character of the rights and remedies to which the party is entitled on payment of the debt. When that is done by the creditor, without the assent of the surety, it is well settled that the latter is discharged.”<sup>1</sup>

**The Rights of a Party under an Award may pass to a Stranger by Assignment.** — P. was in possession of an estate, claiming title. S. also claimed title to it. They submitted the dispute to an arbitrator, agreeing to abide by and perform his award. He awarded against the claim of S., and directed that he should execute a release to P. S. refused to do so; and affairs standing thus, P. died. P.'s administrator sold the estate to H., who brought a bill in equity to obtain a specific performance by S. of the order for a release. The administrator joined with H. in the bill. Chief Justice Shaw, delivering the opinion of the court, said: “In equity, an agreement to perform an award upon a matter of title, or of boundary (which is substantially the same thing), and an award made directing a release to be executed, constitute an agreement to execute a release; and this, in equity, passes with the land, because it is beneficial only to the holder of the land. The privity, therefore, is a privity of estate in equity, arising from the situation in which the parties are placed. As to the objection that the administrator upon the sale . . . did not in terms assign to the purchaser the benefit of this agreement and award, if the administrator himself had not come in and prayed that the defendant (S.) might be decreed to execute the release, it might have

<sup>1</sup> Coleman v. Wade, 2 Seld. 44.

been necessary to examine the conveyance more particularly, to see if such an assignment was not made by implication. It may perhaps have been optional with the administrator, whether he would sue on the agreement at law and recover damages, which, when recovered, would enure to the use of the creditors and heirs, or sell the estate. . . . But by becoming a plaintiff the administrator in effect affirms this assignment to the purchaser, so that we are to consider that, as far as the administrator could, he intended to assign and did assign this award to the purchaser, as one of the muniments of title incident to the land itself." The power of the administrator to make such an assignment was further discussed and affirmed.<sup>1</sup>

If an award be made under a submission between A. and B., finding the title to be in B., and he subsequently sells to C., in an action of trespass *quare clausum* brought by A. against C., the defendant may avail himself of the award by way of estoppel.<sup>2</sup>

If, pending a reference, a party thereto assigns over his contingent right under the award, and, after an award has been rendered in his favor, receives from his adversary the sum awarded, the assignee of his right may maintain against him an action for money had and received. If the assignor pays the arbitrator's charge, on taking up the award, and receives from the losing party under the award not only the amount awarded, but also that amount of the costs of the award for which the latter is made liable, the amount of costs so paid over, as well as the sum awarded, may be recovered by the assignee in the same action.<sup>3</sup>

**An Award is not Evidence in a Criminal Prosecution.**—An award made pursuant to a submission, entered into between two private disputants, is not admissible in evidence in a criminal prosecution against one of them. An indictment

<sup>1</sup> *Hodges v. Saunders*, 17 Pick. 470.

<sup>2</sup> *Shelton v. Alcox*, 11 Conn. 240.

<sup>3</sup> *Smith v. Jones*, 1 Dowl. N. S. 526.



for perjury was brought against a plaintiff, charging him with having committed the crime in an action which he had instituted against the person who was also the prosecutor in this criminal process. The award of the arbitrator, rendered in that action against the plaintiff therein, was held inadmissible evidence in the criminal action, since it was merely the opinion of the arbitrator.<sup>1</sup>

**Operation of an Award in a *Lis pendens*.**—The operation of an award rendered in a pending cause, both upon the cause itself and upon the rights and demands of the parties, has been already discussed. Only one or two rulings remain to be mentioned here.

After a submission had been entered into in a cause, the plaintiff proceeded with the case in court and obtained a verdict. The court refused to set aside the verdict, and left the defendant to seek his remedy by an action on the bond of submission.<sup>2</sup>

Pending a cause the parties submitted the matter to arbitration. When it came on for trial the defendant offered to prove the award. But the court refused to receive the evidence, saying that it was merely the opinion of the arbitrators and of no binding effect in the cause.<sup>3</sup> It is not very easy to understand upon what principle this ruling was made. It is not, at least so far as any language of the judge would show, based upon the doctrine that an award made under a submission, where the whole proceeding by way of arbitration is had after the suit has been instituted and before the trial is had, cannot be pleaded in bar in that action. This is an intelligible and possibly a sound principle,<sup>4</sup> but whether or not it is supported by this cause is left a matter purely of inference or suspicion.

The defendant in a suit had been arrested. A reference of

<sup>1</sup> *Rex v. Fontainemoreau*, 11 Q. B. 1028.

<sup>2</sup> *Potter v. Day*, Pract. Reg. C. B. 47; cited in Russell on Arb., 3d ed. p. 486.

<sup>3</sup> *Elliot v. Heath*, 14 N. H. 131.

<sup>4</sup> See *ante*, in this chapter, the paragraph entitled An Award is pleadable in Bar to a Bill in Equity. But see *Sears v. Vincent*, 8 Allen, 507, stated *ante*, p. 522.

the cause was subsequently made at the trial, a juror having been withdrawn by consent. It was held that even after the award had been made, the defendant was not entitled to be discharged out of custody at the plaintiff's suit. For, inasmuch as neither the rule of court nor the award contained any provision for the discharge, it appeared to be the intention of the arbitrators that he should remain under arrest until the award should be performed.<sup>1</sup>

**Operation of an Award in a *Lis pendens*, including Extrinsic Matters.** — If the parties to a suit after it has been referred by a rule of court, undertake by arrangement between themselves to include matters in dispute between them, but not in issue in the pending cause, the award, embracing the decision of such matters, cannot be made the basis of a judgment. Such a case having arisen in Massachusetts, Chief Justice Shaw said: "The court are of opinion that this award cannot be accepted. The referees have not proceeded nor professed to proceed upon the authority vested in them by the rules of this court, nor to consider the matters thereby referred; but they have considered only the matters embraced in the agreement *in pais* made and signed by the parties, and under the authority given them by that agreement. It stands upon the same footing as if no rule of court had been entered into. . . . If the parties have any remedy upon it, we think it must be by action or by a bill for specific performance; on which question, however, we give no opinion." It was further declared to be now too late to make the agreement *in pais* a rule of court, and so to receive and accept the award and render judgment thereon. Though such was the English practice, yet it had never obtained in Massachusetts, and in England it was based upon the Statute 9 & 10 Will. III. c. 15.<sup>2</sup>

But an award rendered relative to the subject-matter of a pending cause, and upon which no judgment can be entered

<sup>1</sup> *Apsley v. Crosley*, Barnes, 54.

<sup>2</sup> *Shearer v. Mooers*, 19 Pick. 308.

without the consent of the losing party, which he refuses to give, will stand as a valid and operative award, and may be sued upon in the ordinary manner for enforcing an award *in pais*.<sup>1</sup>

**Effect of the Bankruptcy of a Party on the Operation of the Award.**—The effect of the bankruptcy of a party to the submission upon the operation of the award has been discussed in several cases in England. These have been collected by Mr. Russell in his work on Arbitration,<sup>2</sup> and are substantially as follows:—

The validity of the award is not necessarily affected by the fact that, after having entered into the submission, a party thereto becomes bankrupt before the execution of the award.<sup>3</sup> But the award may nevertheless often be enforced by action,<sup>4</sup> by attachment (according to the English practice),<sup>5</sup> or by entering judgment and issuing execution in the cause referred.<sup>6</sup> Were it otherwise, it is obvious that an act of bankruptcy committed by a party, especially if he were the party against whom the claim or demand was preferred, would operate as a revocation of the submission. Strong arguments have been adduced to induce the courts to make this ruling;<sup>7</sup> but they have been without effect. It has indeed been held that the bankruptcy of a party furnished sufficient justification for a revocation by his opponent.<sup>8</sup> But Russell says that “there is no case in which the decision necessarily proceeds on the principle that bankruptcy amounts in itself to a revocation.”<sup>9</sup> And upon the other hand the courts, though they have some-

<sup>1</sup> *Carpenter v. Edwards*, 10 Metc. (Mass.) 200.

<sup>2</sup> Russell on Arb., 3d ed. pp. 487, 488.

<sup>3</sup> *Ibid.*, pp. 153–155.

<sup>4</sup> *Taylor v. Marling*, 2 Man. & Gr. 55.

<sup>5</sup> *Hemsworth v. Brian*, 1 C. B. 131.

<sup>6</sup> *Andrews v. Palmer*, 4 Barn. & Ald. 250.

<sup>7</sup> See *Marsh v. Wood*, 9 Barn. & Cr. 659.

<sup>8</sup> *Marsh v. Wood*, 9 Barn. & Cr. 659; and see *Gaffney v. Killen*, 12 Ir. C. L. Rep. App. XXV.

<sup>9</sup> Russell on Arb., 3d ed. p. 154.

times shunned a decision of the general question where it could be avoided,<sup>1</sup> have yet in some cases directly declared that bankruptcy is not a revocation in law.<sup>2</sup> In the case of *Hemsworth v. Brian*, already cited, the attachment issued notwithstanding the fact that the bankrupt made affidavit that his bankruptcy had rendered it an impossibility to perform the award, because it had deprived him of the property which the award ordered him to deliver up.

If the question referred be only whether or not the party is liable to pay a certain debt, or what is the actual amount of a debt acknowledged to be owing by him, and if after entering into the reference, but before rendition of the award, he goes into bankruptcy, obtains his certificate, and is discharged under the Insolvent Debtors' Act, the fact that the arbitrator has awarded against him, does not operate to preclude him from claiming the benefit of the Statutes of Bankruptcy and Insolvency, in order to relieve himself of liability in respect of all debts from which, had there been no reference, these statutes would have protected him. In such case it has been held that the award should be set aside.<sup>3</sup> Or, if the bankrupt has been taken on an attachment before he has obtained his certificate, he will, after obtaining it, be entitled to be discharged out of custody.<sup>4</sup>

But if the award, besides ordering payment of a debt from which the bankrupt is relieved by the discharge and certificate, also orders him to pay costs from which he is not thus protected, the award will be enforced against him as to the costs.<sup>5</sup>

**An Award creates a Debt provable in Bankruptcy.**—An award

<sup>1</sup> *Taylor v. Shuttleworth*, 8 Dowl. 281; *Taylor v. Marling*, 2 Man. & Gr. 55.

<sup>2</sup> *Andrews v. Palmer*, 4 Barn. & Ald. 250; *Hemsworth v. Brian*, 1 C. B. 131; *Snook v. Hellyer*, 2 Chitt. 43.

<sup>3</sup> *Rex v. Bingham*, 2 Tyrw. 46; *Russell on Arb.*, 3d ed. p. 487.

<sup>4</sup> *Rex v. Davis*, 9 East, 317; *Baker's Case*, 2 Strange, 1152.

<sup>5</sup> *Rex v. Davis*, 9 East, 317; *Haswell v. Thorogood*, 7 Barn. & Cr. 705.

of a sum certain creates a debt provable against the estate in bankruptcy of the losing party.<sup>1</sup>

Under a reference entered into in an action for the balance of an account, an award was rendered for the plaintiff. Before judgment had been entered on the verdict taken subject to the reference, the defendant committed an act of bankruptcy by filing a declaration of insolvency of which he gave immediate notice to the plaintiff. The court allowed the plaintiff to prove as a creditor for the amount found by the award, with interest and costs.<sup>2</sup>

When a party fails to perform an award, and thereby forfeits his arbitration bond, the penalty becomes a debt which, until the award is actually set aside, is sufficient to support a commission of bankruptcy. The simple filing of a bill in chancery to impeach the award will not suspend its effect or make the debt insufficient for this purpose.<sup>3</sup>

**Recitals in the Award as Evidence.**—The recitals contained in the award, of acts done in the course of the proceedings in the arbitration, are not always evidence of the performance of those acts. Thus, the statement in the award that two arbitrators appointed a third to sit with them is not evidence of the fact of such appointment. Neither is proof that this third arbitrator did sit with the other two, and signed the award, evidence of his appointment by them, for both these matters might have taken place without any such appointment.<sup>4</sup> Such, also, is the rule in the United States.<sup>5</sup> The court, in the cited case, said, generally, that the award can be evidence only of those matters in respect of which the parties or the court, from whom it derives its validity and effect, have made it evidence.

**A Valid Award needs no Ratification.**—A valid award creates

<sup>1</sup> *Antram v. Chace*, 15 East, 208.

<sup>2</sup> *Ex parte Harding*, 5 De Gex, M. & G. 367.

<sup>3</sup> *Ex parte Lingood*, 1 Atk. 240; *Russell on Arb.*, 3d ed. p. 438.

<sup>4</sup> *Still v. Halford*, 4 Camp. 17.

<sup>5</sup> *Houghton v. Burroughs*, 18 N. H. 499.

a complete obligation, which has its inception from the time when the award is made. No further act is necessary to give it an operative force. It needs no ratification by the parties or either of them.<sup>1</sup>

**But Voidable Awards may be rendered operative by Ratification.** — But where, as often occurs, an award is voidable, it is perfectly capable of being ratified, and so rendered binding and operative. As has been already stated, the arbitrators are properly considered to be agents of the parties, and as such their acts are properly the subjects of ratification according to the established principles of the law of agency in this respect. Such ratification may be either express or implied; it may be made by a written or verbal assent or acceptance, or it may arise from acts done by a party of such a nature as to raise a presumption of assent or acceptance which he will thereafterward be conclusively estopped to deny.

Upon the basis of this principle it has been held that if, in making up their award, the arbitrators exceed their authority, the party against whom this excess operates will ratify the entire action of the arbitrators by accepting from the other party performance of the acts nominated in the award to be done by such other party. The court said, "The award, having no validity in itself, derives all its force from the acceptance of the parties. It presented to them proposals for their adoption or rejection. It proposed to the one party to transfer certain property, and perform certain other things; and to the other party, to pay certain sums of money, and do certain other things. These terms were mutual and dependent, each forming the consideration of the other. The parties manifested their acceptance of the proposals by the part performance of them. [*I. e.*, the first party transferred the property, and the other accepted it.] The award thus adopted possesses all

<sup>1</sup> *Sears v. Vincent*, 8 Allen, 507; and see the cases cited *ante*, in this chapter, in the paragraph entitled Operation of an Oral Award concerning a Boundary Line.

the ingredients of a contract. It was fairly made, under circumstances which preclude a rescission of it by either party without consent of the other. It must be enforced.”<sup>1</sup>

But if this ratification be made by the losing party in ignorance of the facts, or in misapprehension of his rights, he is bound, so soon as the ignorance or misapprehension is removed, at once to give notice to the other of his intention to rescind his ratification and to reject the award. If he does not promptly take this action, his neglect so to do will finally conclude his right of rescission or rejection.<sup>2</sup> Whether or not, if he be unable to place the other party, who has performed the requirements of the award, *in statu quo*, he can nevertheless rescind, may be regarded as extremely doubtful. The court in Massachusetts, discussing, but not deciding the point, expressed a strong bias against the existence of the right under such circumstances, especially if the misapprehension was of the law and of legal rights or liabilities, the facts being fully known. Their language was: “If the plaintiff cannot be placed *in statu quo*, it would be more reasonable and equitable to hold the defendant to an agreement which he may have incautiously or ignorantly made, than that the plaintiff, who has been guilty of no negligence or mistake, should be subjected to loss or injury. Let him who has committed the error bear the consequence of his own rashness or ignorance.”<sup>3</sup>

Where a submission of the interests of an infant was made without due authority, but he, after coming of age, received from his guardian the sum awarded, and took no action for two years to avoid the award, it was held that he had ratified and confirmed it. Had he refused to receive the money, he might have sued on the original claim. But he could not do both. Having exercised his right of choice, he was debarred from having recourse to the rejected alternative.<sup>4</sup>

<sup>1</sup> Culver v. Ashley, 19 Pick. 300.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Jones v. Phoenix Bank, 4 Seld. 228.

The settlement of an estate by arbitration, in lieu of a formal administration, will be considered final after the heirs have acted upon the finding of the arbitrators, and will not be permitted to be defeated by the subsequent taking out of administration by one of them.<sup>1</sup>

But a decision based upon a theory not quite in accordance with this was rendered in an early case in Connecticut,<sup>2</sup> wherein the court apparently proceeded upon the ground that as there is a statute regulation for the distribution of estates, it must be strictly pursued.<sup>3</sup>

**A Void Award cannot be ratified.** — An award which is, under a statute, not voidable only, but absolutely void, is incapable of receiving validity from any act of ratification.<sup>4</sup>

**Ratification by an Agent.** — Ratification may of course be made by an agent on behalf of a party, provided the agent be thereto duly authorized, or his acts be subsequently adopted by his principal. But it has been held that an agent authorized to enter into a submission has not therefore any implied or resulting power to ratify the award.<sup>5</sup>

**An Award repudiated by both Parties cannot be revived.** — If both parties refuse to be bound by an award, it is thereby rendered for ever null and inoperative. After such a mutual repudiation it is too late for one of the parties to undertake to set it up and rely upon it against the other. It has no resurrection.<sup>6</sup>

<sup>1</sup> *George v. Johnson*, 45 N. H. 456.

<sup>2</sup> *Munson v. Munson*, 3 Day, 260.

<sup>3</sup> *Shelton v. Alcox*, 11 Conn. 240, at p. 245.

<sup>4</sup> *Wiles v. Peck*, 26 N. Y. 42.

<sup>5</sup> *Bullitt v. Musgrove*, 3 Gill, 31.

<sup>6</sup> *Marshall v. Piles*, 3 Bush, (Ky.) 249.



## CHAPTER XIX.

### MISCONDUCT AND FRAUD.

Acts of an arbitrator indicative of partiality constitute misconduct.  
Receiving *ex parte* communications constitutes misconduct.  
Hearing a statement before agreeing to act as arbitrator is proper.  
Relying wholly on statement of a party is misconduct.  
Misconduct in refusing to receive evidence.  
Misconduct in the manner of taking evidence.  
Misconduct in refusing to allow time.  
Sundry other acts constituting misconduct.  
Misconduct of one of several joint arbitrators.  
Irregularity in conducting the proceedings may constitute misconduct.  
Awards made on Sunday.  
A mistake may be treated as misconduct.  
Fraud and corruption may be inferred from excess or injustice in the award.  
What constitutes fraud of a party in procuring an award.  
Concealment of a material fact by a party.  
The question of fraud or misconduct is one of fact for the jury.  
Manner of setting up fraud or misconduct.  
Force of the phrase "undue means."  
Method of availing of fraud, corruption, or misconduct.  
An award cannot be impeached by evidence of misconduct.  
Answering allegations of fraud or misconduct.

THE subject of misconduct and irregularity on the part of an arbitrator, both in respect of what constitutes such misconduct or irregularity, and in respect of the effect thereof, has already been discussed in a great measure in the second part of this book. A few points, however, which did not seem to find an appropriate place in those chapters, remain to be mentioned here.

Acts of an Arbitrator indicative of Partiality constitute Misconduct. — The most ordinary and simple description of misconduct arises out of some act or demonstration on the part of the arbitrator indicative of bias, prejudice, or partiality. We have already seen that the first and most essential requi-

site in a competent arbitrator is a perfect evenness and impartiality. But it is not always enough that this intellectual condition of impartiality actually exists; for if an arbitrator possesses it, yet, if he does any act which is only apparently inconsistent with it, that act will, in nearly all cases, constitute such misconduct that the award will be vacated. It is not alone the fact, but the aspect, of perfect fairness which must be preserved, and an arbitrator cannot be too careful as to his conduct, holding this end in view. It is not his own consciousness of rigid justice that can support his determination of the controversy. It is not his conscientious intent to be honest, nor his conviction in his own mind that he is so, that can suffice. It is his external actions that will be subjected to scrutiny; and if these do not satisfactorily bear the test, the award will fall. His own testimony will be of no avail against these apparent proofs of a contrary nature.<sup>1</sup> To the same effect is the remark of Mr. Russell, that "there may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imputing the slightest improper motives to the arbitrator."<sup>2</sup>

**Receiving ex parte Communications constitutes Misconduct.** — An arbitrator ought not even to talk with a party concerning the subject-matter of the submission while the award is still not made up. It is not in terms decided that any such conversation would actually vacate the award. It would probably depend upon the nature of the remarks made and all the circumstances of the particular case. But if it should amount to receiving an *ex parte* communication, there can be no doubt that it would constitute such misconduct as to vacate the award. Thus if, after the parties have filed written statements of their respective claims, the arbitrators accept a further statement containing new matter from one of the parties without

<sup>1</sup> Strong v. Strong, 9 Cush. 560.

<sup>2</sup> Russell on Arb., 3d ed. p. 654, 655; Phipps v. Ingram, 3 Dowl. 669.

notice to the other, it is such misconduct and partiality as will vacate their award.<sup>1</sup>

After the hearing had been closed, a written statement of new items was presented by a party to the arbitrators, at the request of one of them. Notwithstanding that they were willing to swear that this instrument had not influenced their decision, and though fraud or corruption were not charged, yet upon principle it was considered that such misconduct could have only one effect; the award must be set aside, and a suit at law upon it enjoined.<sup>2</sup>

**Hearing a Statement before agreeing to act as Arbitrator is proper.** — But it is not misconduct on the part of a person to whom application is made to act as arbitrator, and who afterward consents to do so, if at the time of the request he inquires of the party preferring it as to the general nature of the controversy in relation to which his services are wanted. This is only what usually and perfectly properly occurs in such cases. A person cannot be expected to accept such an office with no idea as to the character of the duties which it will involve, or as to whether it may be within the scope of his powers or knowledge to fulfil them.<sup>3</sup>

But it is obviously not permissible for an arbitrator to examine into the matter beforehand on behalf of one of the parties, and to allow that party to know substantially what conclusion he has come to. Misconduct of this description, though occurring before the official character has actually accrued, is an unquestionable cause for vacating the award.<sup>4</sup>

**Relying wholly on Statement of a Party is Misconduct.** — To rely wholly on the statement of one party, unsustained by any manner of proof, would be such partiality as to vacate the award. But after the evidence is all in it is not improper for

<sup>1</sup> *Sisk v. Garey*, 27 Md. 401.

<sup>2</sup> *Cleland v. Hedly*, 5 R. I. 163.

<sup>3</sup> *Campbell v. Western*, 3 Paige, 124 (*per* Walworth, Chanc.)

<sup>4</sup> *Conrad v. Massasoit Insurance Company*, 4 Allen, 20.

the arbitrators to summon both parties before them and question one, especially if the other does not then and there object.<sup>1</sup>

**Misconduct in refusing to receive Evidence.**— If an arbitrator unreasonably refuses to hear a competent witness, it is such gross misconduct as to vacate the award. For such a refusal is against “natural justice.”<sup>2</sup>

If the whole cause be referred back to him by the court, his refusal to admit additional evidence is fatal.<sup>3</sup> But *aliter* if the reference back be only to enable him to make some specific amendment.<sup>4</sup>

**Misconduct in the Manner of taking Evidence.**— Refusal by the arbitrators to take the evidence in writing is not such proof of partiality as to vacate the award.<sup>5</sup>

But if, contrary to express directions, the arbitrator receives affidavits instead of oral testimony, it is misconduct which will invalidate his decision.<sup>6</sup>

**Misconduct in refusing to allow Time.**— If one party unexpectedly appears by counsel, it is partiality in the arbitrator to refuse to make a reasonable postponement to enable the other party also to obtain counsel.<sup>7</sup>

**Sundry other Acts constituting Misconduct.**— Taking money in payment for services, from one party only, before award,<sup>8</sup> or buying up a claim included in the submission,<sup>9</sup> are acts which will be conclusively presumed to destroy the arbitrator’s impartiality. So, also, a private agreement of the arbitrator with either party, concerning the subject-matter in dispute, though not affecting the arbitrator’s own interests.<sup>10</sup>

<sup>1</sup> Hartshorne v. Cuttrel, 1 Green’s Ch. 297.

<sup>2</sup> Van Cortlandt v. Underhill, 17 Johns. 405; Morgan v. Mather, 2 Ves. Jr. 15; Phipps v. Ingram, 3 Dowl. 669; Pepper v. Gorham, 4 Moore, 148.

<sup>3</sup> Nickalls v. Warren, 6 Q. B. 615.

<sup>4</sup> Howett v. Clements, 1 C. B. 128.

<sup>5</sup> Ewing’s Adm’rs v. Beauchamp, 2 Bibb, 456.

<sup>6</sup> Banks v. Banks, 1 Gale, 46.

<sup>7</sup> Whatley v. Morland, 2 Dowl. 249.

<sup>8</sup> Shephard v. Brand, Cases temp. Hardwicke, 53; 2 Barnardiston, 463.

<sup>9</sup> Blennerhassett v. Day, 2 Ball & Beat. 104.

<sup>10</sup> Chichester v. M’Intire, 1 Dowl. N. S. 460.

**Misconduct of one of several Joint Arbitrators.** — Where there are several arbitrators, misconduct on the part of any one of them will suffice to avoid the award of all. If one privately takes the advice of counsel upon an incorrect statement of facts and acts upon the same, knowingly, the award will be void ; though not so, if the statement of the case be correct.<sup>1</sup>

**Irregularity in conducting the Proceedings may constitute Misconduct.** — In addition to the foregoing specific cases, it may be laid down as a general rule that if an arbitrator neglects to do any act which it is his duty to do, or does any act which he ought not to do, or allows a party to do so, in the course of the proceedings, and the error is not subsequently waived by the parties, the irregularity will be a cause for vacating the award, unless, perhaps, it be so insignificant and so void of any possible mischievous effects that the courts would regard an objection based upon it as frivolous. Most of these matters of irregularity, what constitutes them and what effect they have, have been already discussed in considering the subject of the powers and duties of the arbitrator and of proceedings before him. A few rulings, however, may be added.

If the irregularity be in a wholly immaterial matter, or if it is perfectly clear, by the same proof that establishes the fact, that it could have worked no possible prejudice to either party, or at least to the party complaining, it may not be regarded as a sufficient cause for vacating the award.

The admission of evidence, incompetent because relating to matters not submitted, is not a cause for annulling the award, provided the award does not undertake to determine such foreign matters.<sup>2</sup>

An omission to swear the witnesses before the arbitrator is not necessarily fatal to the validity of the award.<sup>3</sup>

An award or report, if properly signed by the arbitrators or

<sup>1</sup> *In re Hare*, 6 Bing. N. C. 158.

<sup>2</sup> *Offut v. Proctor*, 4 Bibb, 252.

<sup>3</sup> *Dater v. Wellington*, 1 Hill, 319 ; *Emmet v. Hoyt*, 17 Wend. 410.

referees, is not vitiated because the signatures of other parties not named in the submission or order of reference are also appended thereto.<sup>1</sup> Such signatures are meaningless, or at the worst are surplusage; and in whichever light they are regarded, they will be simply rejected.

If the clerk reverses the names of the referees, so that the one named first no longer appears as such, and does not therefore act as chairman, it is an irregularity which might be the ground of an objection, provided that it be taken before the hearing, but *aliter* if taken after the hearing.<sup>2</sup>

Such misconduct of the arbitrators as may be described as merely permissive, as, for example, if they cannot preserve proper order and decorum in the proceedings before them, will not constitute a cause for vacating their award. But if they go so far in their weakness as to suffer a party to withhold his books and papers from inspection by the other, whereby he procures the allowance of an unfounded claim, which fact would have been disclosed by an examination of the books, the award must be set aside by a court of equity.<sup>3</sup>

**Awards made on Sunday.** — The arbitrators have no right to act upon Sunday. If they make their award upon Sunday, it will be a totally void instrument.<sup>4</sup>

But where the sitting began on Saturday, was continued after midnight, and, the parties remaining together, the award was published between one and three o'clock on Sunday morning, it was held to be valid.<sup>5</sup>

An award is not avoided by the fact that the day on which the arbitrator directs payment to be made happens to fall on Sunday.<sup>6</sup>

**A Mistake may be treated as Misconduct.** — The theory that a

<sup>1</sup> Carter v. Sams, 4 Dev. & Bat. 182.

<sup>2</sup> Billington v. Sprague, 22 Me. 34.

<sup>3</sup> Cutter v. Carter, 29 Vt. 72.

<sup>4</sup> Strong v. Elliot, 8 Cow. 27.

<sup>5</sup> Sargeant v. Butts, 21 Vt. 99.

<sup>6</sup> Hobdell v. Miller, 6 Bing. N. C. 292.

mistake committed by the arbitrator in making up his award may be regarded as legally constituting misconduct, is sustained in England by the case of *In re Hall & Hinds*.<sup>1</sup> Therein the contention before the arbitrators was merely whether A. was entitled to both or to only one of two sums claimed by him from B. The arbitrators intended to give both sums to A.; but by a singular series of blunders they deducted the smaller from the greater, and in disposing of the result thus obtained, they ordered A. to pay it to B. The court said that such gross mistake and negligence constituted misconduct, in a judicial sense of the term, on the part of the arbitrators; and upon this ground the award was set aside. This cause, and the subsequent judicial discussions upon the soundness of its doctrine, have already been given at length, *ante*, p. 323 *et seq.*

**Fraud and Corruption may be inferred from Excess or Injustice in the Award.**—Fraud or corruption upon the part of an arbitrator, whenever discovered, will furnish a sufficient cause for vacating the award. These may be of two kinds, either positive, as by some act that can be proved; or inferential, where the circumstances so strongly point to dishonesty that the court will consider the presumption of its existence, thus raised, to be conclusive. A common case of inferential fraud or corruption is where the award is obviously and extremely unjust. An erroneous or excessive award is not, for that sole reason, necessarily to be set aside. Yet, if the error or excess be gross and palpable, and if the injustice be great and irremediable, these facts, either alone or taken in connection with other corroborative circumstances, may amount to virtual proof of dishonesty. In such an event the court will imperatively presume the corruption or misconduct of the arbitrators, and will vacate their award, upon proceedings in equity instituted for that purpose.<sup>2</sup> The same causes may be a sufficient ground

<sup>1</sup> 2 Man. & Gr. 847; and see *Ashton v. Pointer*, 2 Dowl. 651.

<sup>2</sup> *Tracy v. Herrick*, 25 N. H. 381; *Rand v. Reddington*, 13 id. 72; *Van Cortlandt v. Underhill*, 17 Johns. 405; *In re Hall & Hinds*, 2 M. & G. 847; *Ashton*

for a court of law to vacate the award, provided the award was required by law to be returned into the court.<sup>1</sup>

**What constitutes Fraud of a Party in procuring an Award.**— Fraud of either of the parties in procuring the award constitutes a sufficient ground in equity for setting it aside.<sup>2</sup> But offering and prevailing upon a groundless claim, or one which the offering party believes to be groundless, is not such fraud. The offeror must, either “by suggestion of falsehood or suppression of truth, have presented to the arbitrators a state of facts in regard to the merits of the claim which were fictitious,” and believed by him at the time to be so. “And it is questionable even how far such a case will justify a court of equity in setting aside the award.”<sup>3</sup>

**Concealment of a Material Fact by a Party.**— A vessel having been lost, the owners and their insurers submitted to arbitrators the question “whether all or what proportion of the freight was due from the company or from the freighters.” Pending the arbitration the owners had in their hands a portion of the freight money which they had collected from the freighters. The award was that the company should pay the whole of the money, and the owners accordingly paid back the sum in their hands to the freighters, and received the whole amount from the insurers. The insurers afterward, discovering the transaction between the owners and freighters, sought to have the award set aside, and to recover back their payment in whole or in part. The court refused, saying that the concealment was not of a material matter, and did not operate as a fraud against the company. The determination of the arbitrators “was equally true and just whether money was or was not in the

*v. Pointer*, 2 Dowl. 651; *Baker's Heirs v. Crockett, Hardin*, (Ky.) 383; *Bumpass v. Webb*, 4 Porter, 65.

<sup>1</sup> *Tracy v. Herrick*, 25 N. H. 381.

<sup>2</sup> *South Sea Co. v. Bumstead*, 2 Eq. Ca. Abr. 80; *Mitchell v. Harris*, 2 Ves. Jr. 129 a; *Metcalf v. Ives*, 1 Atk. 63; *Gartside v. Gartside*, 3 Anst. 735; and American cases cited below.

<sup>3</sup> *Emerson v. Udall*, 13 Vt. 477 (*per Redfield, J.*); *Baker's Heirs v. Crockett, Hardin*, (Ky.) 388; but see *Cutter v. Carter*, 29 Vt. 72, stated *ante*, p. 538.



hands of the [owners], which, in case of another determination of the arbitrators, might have been retained in part payment of the freight. And it is inconceivable that a knowledge by the arbitrators of the fact not disclosed, should have made a difference in the award." . . . The declaration of the arbitrators "is equally true whether the [owners] had or had not any money of [the freighters] in their hands, or whether they had or had not any means of obtaining satisfaction from them." It should be observed that the plaintiffs did not charge actual fraud in this case, but only a wrongful concealment of a fact which ought to have been made known to the arbitrators.<sup>1</sup>

**The Question of Fraud or Misconduct is one of Fact for the Jury.**— Whether or not an award is void by reason of fraud committed by a party, or by reason of corruption or partiality of an arbitrator, is a question not of law, but of fact for a jury. It cannot be brought before the court upon a demurrer to a plea, on the ground that the fraud, corruption, or partiality can be gathered from the papers filed in the cause.<sup>2</sup> Where it is said that the law presumes fraud from certain acts, the presumption is nevertheless based upon the facts, as admitted, appearing on the face of the record or proved.<sup>3</sup>

**Manner of setting up Fraud or Misconduct.**— Where corruption, partiality, or gross misbehavior are relied upon as causes for vacating an award, they must take the form of "charges of a personal nature" against the arbitrator; *e.g.*, that he was corrupt or partial, or that he grossly misbehaved in that, &c. The allegation in the pleadings that the award is corrupt or partial in certain particulars is not sufficient.<sup>4</sup>

**Force of the Phrase "Undue Means."**— The Statute 9 & 10 Will. III. c. 15, provided that awards "procured by corruption or undue means," returnable into court, might be set aside

<sup>1</sup> Newburyport Marine Ins. Co. v. Oliver, 8 Mass. 402.

<sup>2</sup> Duren v. Getchell, 55 Me. 241; Wakeman v. Dalley, 44 Barb. 498.

<sup>3</sup> Wakeman v. Dalley, 44 Barb. 498.

<sup>4</sup> Perkins v. Giles, 53 Barb. 342.

upon motion. The addition of the phrase "undue means" was held considerably to extend the range of causes for which an award might be set aside beyond mere corruption or instances in which improper motives could be attributed to the arbitrator. Thus, it was said they could be set aside for any thing which had occurred in the course of the proceedings inconsistent with natural justice, as for example, for not allowing a party a proper opportunity to discuss his case.<sup>1</sup> Even the latitude allowed by this act has been much stretched by the courts.<sup>2</sup>

The grand principle is, that in a suit at law on an award, or if an award be relied on in bar, no matter *dehors* the award, can be given in evidence to invalidate it.<sup>3</sup> Misconduct, fraud, or corruption cannot be shown save by the aid of such evidence, consequently it is not competent to show them at all.

**Method of availing of Fraud, Corruption, or Misconduct.** — In an action of debt on the arbitration bond, for non-performance of the award, or in an action on the award itself, the defendant cannot, at common law, plead misconduct, or set up facts establishing or amounting to misconduct, on the part of an arbitrator. If he does so, his plea will be bad on demurrer.<sup>4</sup> For example, a plea that the arbitrator refused to grant to the defendant a reasonable time to produce material witnesses, has been held bad on demurrer, as imputing misconduct.<sup>5</sup> So,

<sup>1</sup> Russell on Arb., 3d ed. p. 665; Spettigue v. Carpenter, 3 P. Wms. 361; Vin. Abr. Supp. Arb., p. 301.

<sup>2</sup> Russell, *ubi supra*.

<sup>3</sup> Todd v. Barlow, 2 Johns. Chy. 551; s. c. 3 Johns. 367; Newland v. Douglass, 2 Johns. 62; De Long v. Stanton, 9 id. 38; Finley v. Finley, 11 Mis. 624; Sisk v. Garey, 27 Md. 401; Emery v. Hitchcock, 12 Wend. 156. These cases serve only by way of example; the number of adjudications in which this familiar, but old and now much modified, doctrine has been asserted is infinite.

<sup>4</sup> Fletcher v. Hubbard, 43 N. H. 58; Sherron v. Wood, 5 Halst. 7; Russell on Arb., 3d ed. pp. 529-531; Whitmore v. Smith, 31 L. J. Exch. 107; 7 Hurl. & Nor. 509; Wills v. Maccarmick, 2 Wils. 148; Brazier v. Bryant, 10 Moore, 587; Chicot v. Lequesne, 2 Ves. Sr. 315; Veale v. Warner, 1 Saund. 327 a, n. 3; *contra*, Duren v. Getchell, 55 Maine, 241.

<sup>5</sup> Grazebrook v. Davis, 5 Barn. & Cress. 584; Braddick v. Thompson, 8 East, 344.

again, where an award directed an executrix to pay a certain sum of money, her plea that there was no admission or evidence before the arbitrator of the fact of her having assets, was held ill on a general demurrer. For it imputed misconduct to the arbitrator, who could not rightly direct a personal representative, having no assets of the deceased, to pay his debts.<sup>1</sup>

The remedy is only by a bill in equity seeking to have the award declared null and void, or to have the further prosecution of the suit instituted upon it enjoined.<sup>2</sup> In England this condition of things has been in a great degree modified by the passage of the Statute 9 & 10 Will. III. c. 15. But the old rule still prevails in cases not falling within the operation of that statute, or of the Common Law Procedure Act of 1854.<sup>3</sup>

But if the award be returnable into court so that it must be accepted by the judges, the English practice is stated by Mr. Russell to be that "in every court of law or equity the award will be set aside on motion, if it be proved that the arbitrator is corrupt or partial, or that he is secretly interested in the subject referred."<sup>4</sup> So likewise is the rule in the United States.<sup>5</sup> The law upon this subject is fully stated in Chapter XXII., in the paragraph entitled Vacating an Award by Motion, *quod vide*.

Misconduct of the arbitrator cannot be alleged in bar to an application for an attachment,<sup>6</sup> on the ground that it is an extrinsic objection not apparent on the face of the award itself.<sup>7</sup> And it has even been held that reference cannot be made to the pleadings in the cause referred for the purpose of showing

<sup>1</sup> Riddell v. Sutton, 5 Bing. 200; 2 M. & P. 345.

<sup>2</sup> Sisk v. Garey, 27 Md. 401; Sherron v. Wood, 5 Halst. 7.

<sup>3</sup> Russell on Arb., 3d ed. p. 642; Veale v. Warner, 1 Saund. 327 c, notes.

<sup>4</sup> Russell on Arb., 3d ed. p. 654; Tittenson v. Peat, 3 Atk. 529; Morgan v. Mather, 2 Ves. Jr. 15; Earle v. Stocker, 2 Vern. 251.

<sup>5</sup> Fletcher v. Hubbard, 43 N. H. 58.

<sup>6</sup> Russell on Arb., 3d ed. p. 600; Brazier v. Bryant, 10 Moore, 587; Anon. Andr. 299; Manley v. Bray, 11 Jur. 521.

<sup>7</sup> Butler v. Masters, 13 Q. B. 341; MacArthur v. Campbell, 2 Ad. & El. 52; Paull v. Paull, 2 Cr. & M. 235.

the award to be defective on its face, even though these pleadings be brought before the court by an affidavit identifying them.<sup>1</sup>

Fraud, committed by a party in procuring the award, constitutes a sufficient defence in an action at law upon the award.<sup>2</sup>

**An Award cannot be impeached by Evidence of Misconduct.**—Upon the same principles already enunciated the doctrine is declared to be that where an award is offered in evidence, it cannot be impeached by testimony going to show misconduct on the part of the arbitrator.<sup>3</sup>

**Answering Allegations of Fraud or Misconduct.**—If a bill in equity brought to set aside an award alleges fraud or corruption on the part of either an arbitrator or a party, these allegations must be denied both by averments in the plea, and by an answer in support of it.<sup>4</sup>

If arbitrators are made parties defendant to a bill in equity to set aside their award, on the ground that they have been corrupt or partial, they cannot plead their own award in bar, but must support their plea by an answer showing themselves to be incorrupt and impartial.<sup>5</sup>

<sup>1</sup> *Davies v. Pratt*, 25 L. J. C. P. 71; 16 C. B. 586; *Rowe v. Sawyer*, 7 Dowl. 691.

<sup>2</sup> *Emerson v. Udall*, 13 Vt. 477.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 541; *Wills v. Maccarmick*, 2 Wils. 148.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 554.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 466; *Lingood v. Croucher*, 2 Atk. 395; *Rybott v. Barrell*, 2 Eden C. C. 131.

## CHAPTER XX.

### PERFORMANCE OF THE AWARD.

Time of performance.

A colorable performance is bad.

Performance according to the intent of the award is sufficient.

Performance to a reasonable intent.

Performance of awards ordering payment.

Non-performance of awards ordering payment of rent.

Performance of awards putting an end to suits.

Performance under an award calling for a deed.

By which party an instrument of conveyance is to be prepared.

Whether a request for a conveyance ordered is necessary.

A request for performance must comply with the terms of the award.

The request may be made by an agent.

Release may be executed to a stranger.

A tender creates the obligation of performance.

Performance to and by representatives of a deceased party.

Performance where the award is in excess of authority.

Performance of awards ordering indemnity.

Performance of awards ordering acquittance or that suits should cease.

A party may sometimes sue before he has performed his part under the award.

The plaintiff must perform, if performance be made dependent, concurrent, or a condition precedent.

Performance of impossible orders.

Where the impossibility grows out of a wrongful act of the party.

Performance of an award in the alternative.

An informal award may be made good by performance.

The effect of performing an unenforceable order.

The arbitrators need not perform the award.

The award itself after performance.

Security for performance of the award.

**Time of Performance.** — So soon as a valid award has been made and published, the duty of obedience to its mandates accrues. Neither party is bound to notify the other of the making of the award as a preliminary to rendering this obligation of performance complete and instantly binding, according to the terms or construction of the award. Each is supposed to

have an equal knowledge of the fact that the award has come into existence as a perfect and effective instrument.<sup>1</sup> Though it is said that if any thing has been deposited in the hands of a third person, not a party to the submission, with the stipulation that it shall be disposed of according to the directions of the arbitrators, such third person is not constructively affected with notice of the award, but should hold the article until actual notice is given to him.<sup>2</sup>

If no time for performance is named in the award, it has been already said that the English rule is that a sensible construction will be given to the award, and a reasonable time for performance will be allowed in view of the nature of the thing ordered to be done, and the circumstances.<sup>3</sup>

But in the United States an award naming no time for performance has been said to be void for uncertainty.<sup>4</sup>

**A Colorable Performance is bad.** — Performance must be *bona fide*. A technical or colorable performance, practically fraudulent, or having the substantial result of avoiding the real intent and force of the award, will furnish no defence in proceedings for enforcement. In a suit brought in the name of a husband and wife, concerning the wife's right to an annuity, the husband was made a party against his will. An award was rendered ordering that the arrears of the annuity should be paid to the wife. In proceedings to compel payment to her by an attachment, it was held to be no answer that the husband had previously demanded the arrears, and that they had been paid to him; inasmuch as it appeared that such payment to him had been collusive, and had been made by the paying party with a knowledge that it had been intended by all con-

<sup>1</sup> Russell on Arb., 3d ed. p. 496; Child v. Horden, 2 Bulst. 143; Gable v. Moss, 1 id. 44; Bell v. Twentyman, 1 Q. B. 766.

<sup>2</sup> Russell, *ubi supra*; Wilkinson v. Godefroy, 9 Ad. & El. 536; and see *ante*, p. 290.

<sup>3</sup> *Ante*, pp. 424, 425; Russell on Arb., 3d ed. pp. 275, 495; Bac. Abr. Arb., F; Freeman v. Bernard, 1 Salk. 69.

<sup>4</sup> Carrochan v. Christie, 11 Wheat. 446; stated *ante*, pp. 424, 425.

cerned that the wife should enjoy the fruits of the action if the result should be in her favor.<sup>1</sup>

**Performance according to the Intent of the Award is sufficient.**—Performance need extend only to the intent of the arbitrators. Their award will be construed with due regard to the circumstances existing at the time of its rendition. If these be changed afterward, the obligation will not be increased beyond their obvious understanding of the instrument.<sup>2</sup>

An award of commissioners ordered that the owners of land over which a drain passed should cleanse the drain, and keep it sufficiently wide and deep to carry off the water “intended to run down the same.” Subsequently to the making of this award, the owner of land by which this drain passed, and which was drained by it, in order to drain his lands more thoroughly, opened into it a new “sough” or under-drain. It was held that, inasmuch as at the time of making their award the commissioners did not contemplate this proceeding, the obligation in the award concerning the width and depth of the drain did not require that it should be kept of sufficient capacity to carry off the additional water passed in by the sough.<sup>3</sup>

**Performance to a Reasonable Intent.**—Lessees of some lands and coal-mines, found and expected to be found, covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the business, and as was in such cases usual and customary; also immediately to erect such fire-engines as should be necessary. An award ascertained the damages occasioned by their default, and further directed that they should sink to and through the coal-mines demised, and should erect fire-engines thereon ready and complete for working the mines and getting out the coal, according to the terms of the lease, before a certain day. The lessees having showed that they had sunk for coal as far as they could and ought in the

<sup>1</sup> *Wynne v. Wynne*, 4 Man. & Gr. 253; 1 Dowl. n. s. 723.

<sup>2</sup> *Preston v. Whitcomb*, 11 Vt. 47, at p. 56.

<sup>3</sup> *Sharpe v. Hancock*, 7 Man. & Gr. 354.

judgment of persons of competent skill in such matters, and as far as was usual and customary, and that no coal-bed had been found which was worth working, it was held that they had sufficiently performed the award.<sup>1</sup>

**Performance of Awards ordering Payment.** — Where an award directs a sum of money to be paid, the money is payable without demand, and the party by whom it is to be paid must seek out the payee.<sup>2</sup>

So if money is ordered to be paid at a particular time and place, the party by whom payment is to be made ought to be present at the time and place to make a tender of the money, even though the party to receive it is not there.<sup>3</sup>

If the defendant be directed to pay to the plaintiff, on a specified day, his costs of suit, to be taxed by the proper officer, the defendant must have them taxed so as to be prepared to make the payment on the day named.<sup>4</sup>

**Non-performance of Awards ordering Payment of Rent.** — If arbitrators award that the defendant shall “enjoy a house, paying rent to the plaintiff,” the failure of the defendant to pay the rent is a forfeiture of the arbitration bond. The stipulation for the payment is not a mere condition of the enjoyment, upon non-performance of which the defendant’s estate is to cease.<sup>5</sup> But if the award direct one to make a lease to the other, rendering certain rent to the lessor, the construction will be different. If, after the lease has been made, the rent be not paid, the non-payment does not constitute a breach of the arbitration bond. Distress or an action of debt for the rent are the proper remedies. Though, if the award should in terms order the lessee to pay the rent, then, as in the former case, a non-payment would work a forfeiture of the bond.<sup>6</sup>

<sup>1</sup> *Hanson v. Boothman*, 13 East, 21.

<sup>2</sup> *Furser v. Prowd*, Cro. Jac. 423.

<sup>3</sup> *Doyley v. Burton*, 1 Ld. Raym. 533.

<sup>4</sup> *Candler v. Fuller*, Willes, 62.

<sup>5</sup> *Parsons v. Parsons*, Cro. Eliz. 211.

<sup>6</sup> *Anon. F. Moore*, 3 pl. 8.



**Performance of Awards putting an End to Suits.**—An award ordering that all suits between A. and B. shall cease is not broken by the prosecution by A. of suits in which B. is a defendant jointly with others.<sup>1</sup>

An award directing that the plaintiff should not prosecute nor proceed in a certain action in the same term, has been held not to be broken by his continuing the action from term to term, since otherwise he could never afterward have proceeded with it.<sup>2</sup> But where the award forbids the plaintiff to continue the action, it is said that his continuance of it by his attorney is a breach ; but that there is no breach if the attorney continue the action without the privity of his client.<sup>3</sup>

**Performance under an Award calling for a Deed.**—An award simply directing the execution of a deed, or of a good deed, or the like phrase, has been held to be satisfied by the execution of a deed legally sufficient to pass the title in the premises. The ground taken is, that the award has nothing to do with the title or possession of the party directed to make the deed. His title may be good or bad, he may be seised or disseised of the premises ; these facts, so far as the award is concerned, are matters of indifference. Execution of a deed only having been ordered, the execution of a deed *per se* good and intrinsically capable of effecting the transfer is sufficient, though extrinsic circumstances may make the instrument practically useless ; and *seem* that a quitclaim deed will satisfy the requirement.<sup>4</sup>

The subject of the character of the instrument, called for by an award, is discussed *ante*, pp. 399–402, inclusive.

**By which Party an Instrument of Conveyance is to be prepared.**—Where an award orders conveyances of any description to be

<sup>1</sup> Barnardiston v. Fowler, 10 Mod. 204.

<sup>2</sup> Gray v. Gray, Cro. Jac. 525.

<sup>3</sup> Ibid.

<sup>4</sup> Preston v. Whitcomb, 11 Vt. 47 ; Redfield, J., dissenting, on the ground that the offer made in this case to show an adverse possession was admissible, since that fact, if proved, would show that the deed was not a good one, but wholly inoperative. See also Tinney v. Ashley, 15 Pick. 546 ; and the cases cited by the court in Preston v. Whitcomb.

executed or delivered, the question which party is entitled or obliged, to prepare the instrument constitutes a natural and frequent subject of dispute, if it has not been disposed of by the arbitrators. In an old case it was said that if the award order one person to convey an estate to another by such a time, the former is to procure the conveyances to be made. So if the order be that one shall convey to another by such conveyances as shall be approved by a certain counsel named, then the party named as grantor is bound to have the deeds prepared and procure the approval of the counsel.<sup>1</sup>

In a later case the award ordered the lessor of the plaintiff to pay the defendant a certain sum for a piece of copyhold land, and that the defendant should, at the plaintiff's charge, surrender the land to his use, the payment to be contemporaneous with the surrender. The court held that the defendant was bound to prepare and execute the surrender, or at least to give notice that she would attend to make it. It was proved that the defendant was requested to make the surrender, that payment of the price and of the costs of the surrender was offered to be made upon the surrender being effected ; and thereupon the court granted an attachment against the defendant.<sup>2</sup>

An arbitrator, to whom it had been referred to determine whether or not a contract subsisted for the purchase of certain land, awarded that the contract was in force, that the defendant (the intended grantee) should perform it and pay a certain sum upon the conveyance of the land being made to him by the plaintiff. The court held that in order to bring the defendant into contempt for non-performance, the plaintiff should have executed a conveyance, and tendered the same to him, and demanded the price awarded.<sup>3</sup>

Mr. Russell, commenting on the two above-stated cases of *Doe d. Clarke v. Stillwell* and *Standley v. Hemmington*, says

<sup>1</sup> *Candler v. Fuller*, Willes, 62.

<sup>2</sup> *Doe d. Clarke v. Stillwell*, 8 Ad. & El. 645.

<sup>3</sup> *Standley v. Hemmington*, 6 Taunt. 561.

that they were both decided upon what was supposed to be the general rule respecting the duty of a vendee of real estate under a contract of sale, to wit, that he should "prepare and tender the conveyance for the execution of the vendor." But it seems from the last edition of Sir Edward Sugden's work on Vendors and Purchasers, that the rule, which never was sanctioned by the practice of conveyances, has ceased to be law. The effect of what is there stated may be thus abridged: When the contract for sale of lands is silent respecting the preparation and costs of the conveyance, it seems now to be settled law, notwithstanding the ancient cases, and many *dicta* to the contrary, that it is the duty of the purchaser, at his own expense, to prepare and tender the conveyance to the vendor for execution. If the agreement expressly require the purchaser to prepare and bear the expense of the conveyance, it was always clear that the vendor need not tender a conveyance. But when the conveyance is to be prepared at the expense of the vendor, and there is nothing in the agreement to show who is to prepare it, it has been decided that the duty of preparing, as well as paying for, the instruments, falls on the vendor.<sup>1</sup>

In Massachusetts, in construing a contract wherein the defendants agreed to sell land to the plaintiff, and to execute and deliver to him a deed thereof, the court said, "As to the other part of the objection, that it was incumbent on the plaintiff to prepare a deed for the defendants to execute, we think it clearly was not. The defendants contracted to execute and deliver a good and sufficient deed, and it is incumbent on them to do whatever was necessary to the performance of their contract. If the law in England is otherwise, it must be founded on custom and practice, and not on any legal principle independently of practice."<sup>2</sup>

<sup>1</sup> Russell on Arb., 3d ed. pp. 500, 501; Sugden on Vendors & Purchasers, 11th English ed., vol. i. p. 262.

<sup>2</sup> Tinney v. Ashley, 15 Pick. 546, at p. 552.

**Whether a Request for a Conveyance ordered is necessary.** — The following is the only English authority which I find concerning the point of whether or not the party to receive the conveyance is under an obligation of requesting the same from the grantor. An arbitrator directed that on payment of the mortgage debt, the mortgagee should re-assign the mortgaged land. The court held that the duty of making the re-assignment was complete and in force without any prior request from the mortgagor. No request was necessary, because the act could be performed without the presence of both parties ; but it would have been otherwise had the order been to re-infeoff, because in such case the feoffee must have been present to receive the livery.<sup>1</sup>

In Massachusetts, where A. agreed to pay B. such price for certain land as arbitrators named should award, and B. agreed to accept such price and convey the land to A., it was held that A. must demand the conveyance from B. before he could maintain a suit against him for breach of his agreement.<sup>2</sup> But the language of the agreement of parties in this case was so specific that perhaps the decision ought not to be taken as establishing a general rule requiring demand.

**A Request for Performance must comply with Terms of the Award.** — If the award orders a conveyance of any kind to be executed upon request, it seems obvious that the request should be for an instrument precisely such as is ordered, named, or described in the award to be given. Otherwise a refusal to comply with the request might constitute no breach of the obligations of the submission and award.<sup>3</sup>

An award ordered the defendant to assign, according to law, a certain interest to one D., upon request. An assignment was tendered to the defendant, which he was requested to execute, but which ran to D., his executors, administrators, and assigns.

<sup>1</sup> *Rosse v. Hodges*, 1 Ld. Raym. 233.

<sup>2</sup> *Pomroy v. Gold*, 2 Metc. (Mass.) 500.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 501.

This was objected to, as being in excess of what was called for by the award. Lord Ellenborough was inclined to think that the direction might intend only a personal assignment to D. himself. But the point was not finally ruled upon, because the cause was compromised by the parties.<sup>1</sup>

**The Request may be made by an Agent.** — The courts regard a demand for the execution of a deed under an award as being very different from a demand for the payment of money. A demand of the former description may be sufficiently made by any person authorized to do so on behalf of the party, though the authority be not in the shape of an actual power of attorney.<sup>2</sup>

**Release may be executed to a Stranger.** — An old case holds that if the defendant, being ordered to execute a release to the plaintiff, deliver a properly executed release to a stranger, to the use of the plaintiff, which the plaintiff refuses to accept, such tender and refusal may be pleaded as a good performance of the award, if no particular place be mentioned for the delivery.<sup>3</sup>

**A Tender creates the Obligation of Performance.** — If the award directs one party to pay a sum of money, and the other party, upon receipt thereof, to execute a conveyance, the latter cannot free himself from his obligation of performance by refusing to accept the money when properly tendered. The tender brings into full and perfect force and operation the requisition for the conveyance.<sup>4</sup>

**Performance to and by Personal Representatives of a Deceased Party.** — If the award order payment to be made to a party or his assigns within a time named, and that thereupon each party should give to the other a release, if the party who is to receive the money dies before the time has expired, the payment must

<sup>1</sup> *Russell v. Headington*, 1 Stark. 13.

<sup>2</sup> *Kenyon v. Grayson*, 2 Smith, 61.

<sup>3</sup> *Alford v. Lea*, 2 Leon. 110; *Cro. Eliz.* 54; *Freeman v. Drew*, ib. 181.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 501; *Squire v. Grevett*, 2 Ld. Raym. 961; *Lumley v. Hutton*, *Cro. Jac.* 447; *Simon v. Gavil*, 1 Salk. 74; *Linnen v. Williamson*, *Rolle Abr. Arb.*, K. 16, p. 254.

be made to his personal representatives, though they are not named in the award, and they must execute and deliver the release of all demands such as was ordered to be given by the deceased.<sup>1</sup>

**Performance where the Award is in Excess of Authority.**— If an arbitrator, being authorized to order a release of all demands up to the date of the submission, exceeds his authority by ordering such a release up to the time of the award, sufficient performance may be made by executing a release, such as he was empowered to order, up to the time of the submission.<sup>2</sup>

**Performance of Award ordering Indemnity.**— If the arbitrator direct a party to execute a bond or covenant of indemnity to another against certain costs, and the party performs the award by executing such bond or covenant, the remedy on the arbitration bond is gone. If there be a failure to save harmless the party intended to be protected by the indemnity, the remedy will be only on the indemnity bond or covenant.<sup>3</sup>

**Performance of Awards ordering Acquittance or that Suits should cease.**— An award that A. “shall acquit” B. of a certain debt or suit, is not sufficiently performed by saving B. harmless from the debt or suit. An actual discharge ought to be procured.<sup>4</sup>

An award was that a suit in chancery should “cease,” and that the defendant should “stand acquitted of it.” In an action of debt on the arbitration bond for non-performance of the award, it was said to be a sufficient plea that the plaintiff did not prosecute the suit, and that the defendant *staret inde quietus*. For the award ordered no act to be done by the one party, but said that by virtue of the award the other should stand acquitted. The mere filing a fresh bill in chancery for the same matter constituted no breach of the award; for until a subpœna should

<sup>1</sup> Dawney v. Vesey, 2 Vent. 249.

<sup>2</sup> Stevens v. Matthews, 1 Ld. Raym. 116; Marks v. Marriot, ib. 114.

<sup>3</sup> Phillips v. Knightley, 1 Barnard. 463.

<sup>4</sup> Freeman v. Sheen, Cro. Jac. 339; 2 Bulst. 93; Bac. Abr. Arb., F.; Russell on Arb., 3d ed. pp. 502, 503.

have been issued on the bill, the party had not been damnified. But if one, being bound to save another harmless, obtain a process against him, this is a clear breach of the award.<sup>1</sup>

**A Party may sometimes sue before he has performed his Part under the Award.**—The neglect or refusal of one of the parties to a submission to perform his part of the award, does not vacate the award, or deprive him of his right to enforce the orders made therein in his own favor, unless performance by him is specifically, or by legal construction of the instrument, made a condition precedent to performance by the other party; or unless the performance is to be contemporaneous, the one with the other. The commands laid upon each party, if independent, may be enforced by either against the other, even though the plaintiff be himself a delinquent. The remedy against such delinquent is by another suit to be instituted against him.

Thus, it was said in New Hampshire that “Where by an award acts are to be performed by both parties, and those acts are distinct and independent, the one not a condition precedent to the other, either party is guilty of a breach of the award who does not perform all that he is appointed to do, although the opposite party may have entirely neglected to obey the award on his side. And in such case, in a suit for not performing the award, it is not necessary for the plaintiff to aver performance or a readiness to perform his part of the award.”<sup>2</sup>

And in Massachusetts the court disposed of the objection of non-performance by the plaintiff, by saying, “Each party had the separate bond of the other for the due performance of the award by each, and might enforce such performance.”<sup>3</sup> To the same effect is another New Hampshire case.<sup>4</sup>

A submission was entered into between one S. and the town of Bloomfield, concerning a roadway laid out by the town over

<sup>1</sup> *Freeman v. Sheen*, Cro. Jac. 339; 2 Bulst. 93; 1 Rolle's Rep. 7; Russell on Arb., 3d ed. p. 502.

<sup>2</sup> *Girdler v. Carter*, 47 N. H. 305.

<sup>3</sup> *Loring v. Whittemore*, 13 Gray, 228.

<sup>4</sup> *Pickering v. Pickering*, 19 N. H. 389.

land of S. In a suit by S. against the town to recover the amount of damages awarded to him, the defendants set up that S. still maintained his fences across the land laid out as a roadway, and that he was therefore in possession thereof and entitled to recover no damages. The defence was regarded as of no effect; for, said Judge Redfield, "if the plaintiff, after the award, still persisted in keeping up his fences across the road, this would not avoid the award, but leave the town to their remedy under the general laws."<sup>1</sup>

Where, under an award, a party is required to give to another upon a certain day a deed of certain land, and also to deliver to him possession of the land, if, upon his tendering the deed, the grantee refuses to receive it, this is a renunciation of all rights incident to and growing out of the deed. The grantor has gone sufficiently far in his endeavor to perform the award, and is excused from making an effort to deliver possession.<sup>2</sup>

See also, *ante*, Chapter XVIII., the paragraphs entitled "Whether a Party, not having performed his Part of an Award, can plead it in Bar," and "A Condition Precedent must be performed before an Award is a Bar."

**The Plaintiff must perform, if Performance be made dependent, concurrent, or a Condition Precedent.** — But if the acts ordered to be done are dependent, or are to be done concurrently, or if performance by the plaintiff has been made a condition precedent to performance by the defendant, then either performance or a readiness to perform must be averred and shown.<sup>3</sup>

In a dispute between a mother and son, who had lived together on a farm, as to their accounts, the award was that the property should be equally divided, that the debts, by whomsoever owed, should be discharged by them in equal

<sup>1</sup> Schoff v. Bloomfield, 8 Vt. 472.

<sup>2</sup> Preston v. Whitcomb, 11 Vt. 47.

<sup>3</sup> The general rule is well laid down in *Tinney v. Ashley*, 15 Pick. 546, though the case did not arise under an arbitration.



shares, and that the mother should pay to the son \$250. The court held that the things to be done were dependent, that the son must pay half the debts before he would be entitled to demand half the property and the \$250.<sup>1</sup>

A. and B. agreed to submit to arbitrators the value of certain land, and that upon their report of the price A. would pay the amount thereof to B., and B. would convey the estate to A. In a suit by A., he alleged a readiness to pay for the land, but the court held that this was insufficient; that he should have averred an actual tender or offer of payment; and that he was not excused from doing so though B. had stated immediately upon hearing the award, in the presence of the arbitrators and of A., that he would never let the land go for that price.<sup>2</sup>

An award was that A. should pay to B. a certain sum of money, and should execute to him a release; and that upon receiving the money and the release B. should deliver a release to A. Suit was brought by B. for the money. Judge Curtis said: "I am of opinion that a readiness by the plaintiff to release, and notice to the defendant of such readiness, were necessary to be averred. . . . The acts of the parties were to be concurrent, and an action cannot be sustained *by either* without averring and proving a readiness on his part to perform and notice thereof, or something sufficient to dispense therewith."<sup>3</sup> It would seem beyond a doubt that had the suit been brought by A. for non-performance by B., or to compel performance, his own performance or readiness to perform must have been alleged and shown.

Arbitrators, under a submission concerning a loss occurring under a policy of insurance, ordered that the insurance company should pay to the insured a certain sum, and that the insured should assign to the company his claim under a certain

<sup>1</sup> *Shearer v. Handy*, 22 Pick. 417.

<sup>2</sup> *Pomroy v. Gold*, 2 Metc. (Mass.) 500.

<sup>3</sup> *Matthews v. Matthews*, 2 Curtis C. C. 105.

other policy held by him. The award did not in terms make these acts dependent, the one upon the other. The court held that they were not so, and that in suit by the assured against the company he need not aver or prove his performance or readiness to perform the offer of assignment. He could recover without establishing this fact, and if he refused to comply with the order, the company could compel him to assign (provided the order were valid) in a suit instituted for that purpose.<sup>1</sup>

Whether or not the arbitrators have made performance by one party a condition precedent to performance by the other, is a question to be determined upon an examination of the entire award. Thus an award ordered A., on or before a day certain, to execute a deed of certain land, and to deliver possession of it to B.; and ordered B. to pay to A. a certain sum, likewise on or before the same day. *Held*, that it was not necessary to say whether or not performance by A. was made a condition precedent to performance by B.; "perhaps it is not, but the acts of the parties are clearly concurrent, as they are to be performed upon the same day, and applying the rule applicable to concurrent covenants which are analogous, the party suing must show performance, or an offer to perform on his part, to entitle himself to a recovery."<sup>2</sup>

Though it has been said that where an obligation is so thrown upon one party as to be but a portion of the consideration of the award in his favor against the other party, the performance of that obligation, if not provided for by the award, may be properly treated as a condition precedent to his recovery on the award.<sup>3</sup>

**Performance of Impossible Orders.** — The subject of possibility in the orders of the award has been discussed, *ante*, pp. 375, 376. It may be further remarked that a party ordered to do

<sup>1</sup> *Nichols v. Rensselaer County Mutual Insurance Company*, 22 Wend. 125.

<sup>2</sup> *Hay v. Brown*, 12 Wend. 591.

<sup>3</sup> *Lamphire v. Cowan*, 39 Vt. 420.

any act can defend or excuse his non-performance on the ground of impossibility, only if he has used his best endeavors to perform either in full or so far as the possibility may extend. But actual or legal impossibility, fairly demonstrated, is of course a defence. Thus, when a party was ordered to prostrate some fish-weirs of which he was sole proprietor, and another weir in respect of which he was only part proprietor, the award expressly professing to extend only so far as the party had any right or interest, it was held that the party was bound to perform to the extent that he was able, and that, having done so, if he could not remove the portion of the last-named weir which belonged to him without rendering himself liable to an action of trespass, this fact would be an answer to so much of the orders of the award.<sup>1</sup> That portion of an award which orders a person to do that which he cannot lawfully do, as, for example, to commit a trespass, obviously need not be performed, since it is not valid.

**Where the Impossibility grows out of a Wrongful Act of the Party.**—Where a party, by reason of his own wrongful act, finds himself in a position in which it is impossible for him to perform the award exactly without violating the law, it seems that he must conform to the law, and yet comply with the award as nearly as possible. Something like the doctrine of *cy pres* in charities has apparently been introduced into causes of this description. Thus, where a party had wrongfully pulled down certain premises, the award ordered him to reinstate them. To restore them exactly as they were before would have been a breach of the provisions of a public statute which had been passed subsequently to their original erection. It was held that the party was bound to rebuild in accordance with the regulations of the statute, and though it put him to an increased expense, yet this, being the result of his own wrongful act, furnished no cause for excusing him from performance.<sup>2</sup>

<sup>1</sup> Russell on Arb., 3d ed. pp. 496, 497; *Doddington v. Bailward*, 7 Dowl. 640.

<sup>2</sup> *Doddington v. Hudson*, 1 Bing. 410.

**Performance of an Award in the Alternative.**—If an award be made in the alternative, giving to a party his option as to which of two courses he will select, his performance of either is a sufficient performance of the award.<sup>1</sup>

But if one of the alternatives be impossible, performance of the other becomes imperative.<sup>2</sup> So, also, if one of the alternatives be uncertain, the other must be performed.<sup>3</sup>

**An Informal Award may be made good by Performance.**— See *ante*, p. 258, the paragraph entitled “Award concerning Boundary Lines”; also Chapter XVIII., the paragraph entitled “Operation of an Oral Award concerning a Boundary Line.”

**The Effect of performing an Unenforceable Order** has been already thoroughly discussed. See Chapter VI., the paragraph entitled “Effect of Performance of such Non-enforceable Orders”; Chapter XVII., the paragraph entitled “Effect of an Offer to perform an Inoperative Order.”

**The Arbitrators need not perform the Award.**— This subject is discussed *ante*, pp. 394, 395.

A submission concerning the height of a dam provided that the arbitrators might determine how much, if at all, it should be cut down, and “whatever they decide shall be done under their direction.” The award fixed the height at which the dam should be maintained below the present height. It was objected that the arbitrators were bound to superintend the process of cutting down. The court held otherwise, and said that if they had “given general directions, which can be executed by any person skilled in such matters, then they have conformed to the terms of the submission. The parties can hardly have intended that the referees should execute the award.” The part of the dam above the line established by

<sup>1</sup> *Hanson v. Webber*, 40 Maine, 194, stated *ante*, p. 408.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 269; *Simmonds v. Swaine*, 1 Taunt. 548; *Wharton v. King*, 2 Barn. & Ad. 528; *Lee v. Elkins*, 12 Mod. 585. See statements of these cases, *ante*, p. 409.

<sup>3</sup> *Oldfield v. Wilmer*, 1 Leon. 140, 304; *Simmonds v. Swaine*, 1 Taunt. 548; *ante*, pp. 409, 410.

the referees became a nuisance, and could be abated by the sheriff in the usual manner.<sup>1</sup>

**The Award itself after Performance.** — The court has no power over the award whereby it can order the same to be delivered up for cancellation after performance.<sup>2</sup>

**Security for Performance of Award.** — A note of a third party having been placed in the hands of an arbitrator as security for the performance of the award by one of the parties to the submission, the court said that delivery of the note could be made only after a valid award had been made with which this party had refused to comply. The delivery of the note under other circumstances would be fraudulent; and was so held in this case, and the note declared to be invalid, inasmuch as the party secured had only neglected to comply with a certain memorandum or proposition to the parties appended by the arbitrator to the award, and agreed to by the parties, but, nevertheless, not in fact constituting a part of the award itself.<sup>3</sup>

<sup>1</sup> *Berkshire Woollen Company v. Day*, 12 Cush. 128.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 499; *Symonds v. Mills*, 8 Taunt. 526.

<sup>3</sup> *Moore v. Cockcroft*, 4 Duer, 133.

## CHAPTER XXI.

### TESTIMONY OF THE ARBITRATOR.

The award cannot be altered or explained by testimony or statements of the arbitrator.

Effect of letters written by the arbitrator.

Explanatory paper written by agreement of parties.

The arbitrator's testimony concerning extrinsic facts.

Testimony of referee as to facts and grounds of decision.

The arbitrator's testimony as to admissions by a party.

An arbitrator cannot testify to his non-concurrence in the award.

The arbitrator cannot be compelled to state the grounds of his decision.

In England a barrister never gives explanations.

Testimony of the arbitrator to show a mistake in the award.

Testimony that the award does not express the arbitrator's intention.

An arbitrator can and must testify as to the proceedings before him.

**The Award cannot be altered or explained by Testimony or Statements of the Arbitrator.**— The award of arbitrators, once made, is a complete and finished instrument. It must be construed, so far as regards its legal force and signification, without external assistance. Neither affidavits nor testimony of the arbitrator or referee can be received to alter, correct, or even explain its meaning.<sup>1</sup>

Since even the deliberate and formal testimony given in court by the arbitrators cannot be thus received, it follows as a rule *a fortiori*, that mere informal verbal declarations, explanatory of the intended purport and effect of the award, though made by the chairman of the arbitrators to the parties at the time of publishing and reading the report to them, do not operate to alter the construction of the instrument as actually written and executed.<sup>2</sup>

<sup>1</sup> Aldrich v. Jessiman, 8 N. H. 516; Kingston v. Kincaid, 1 Wash. C. C. 448; Ward v. Gould, 5 Pick. 291; *ante*, p. 226; Patterson v. Baird, 7 Ired. Eq. 255; Gordon v. Mitchell, 8 Moore, 241; Russell on Arb., 3d ed. pp. 471, 472.

<sup>2</sup> Caldwell v. Dickinson, 13 Gray, 365, stated *ante*, p. 287.

An award described a boundary line as running "to a stake and stones (described), thence westerly by land of said C. to a spruce tree in the swamp." The termini were undisputed; but it was questioned whether or not the line was to be run straight. It was held that the oral declaration of the chairman of the arbitrators made at the time of the publication of the award, to the effect that the line in question was a straight line, was inadmissible to explain or control the purport of the written award.<sup>1</sup>

The statements of an arbitrator, made by him three days after the making and publication of the award, as to the grounds upon which he had formed his opinion, offered to be proved by testimony of another, are mere hearsay and inadmissible. The arbitrator himself must testify to any material fact like any other witness.<sup>2</sup>

**Effect of Letters written by the Arbitrators.**—In *Leggo v. Young*,<sup>3</sup> the umpire wrote a letter to one of the parties, expressing his regret that he could not have given him costs. In refusing to grant a motion based upon this letter, Judge Maule said: "I do not think this is a sort of thing that should be taken notice of, or permitted to operate against the deliberate decision to which the umpire has come. We are rather more scrupulous now than the courts formerly were as to these explanatory papers given out by arbitrators. One can easily conceive that an arbitrator might write to one of the parties and express his regret that he cannot award him costs, without holding him to be pledging himself that he would have decided otherwise than he did, if he thought the authority under which he acted permitted him to do so." And so also said Chief Justice Jervis: "As for the arbitrator's letter, I do not think we can take that into consideration at all. It would

<sup>1</sup> *Clark v. Burt*, 4 Cush. 396.

<sup>2</sup> *Hubbell v. Bissell*, 2 Allen, 196.

<sup>3</sup> 16 C. B. 626.

be a very unsafe thing to place reliance upon such a communication for the purpose of contradicting or explaining the award, or the grounds upon which it is made."

It was so held also in another case, where the letter was not a "paper delivered contemporaneously with the award," but an ordinary letter of "advice given by the master in order that the parties may not waste their time and money in future litigation;" and "merely written for the purpose of conciliation, the master, from a kind motive, thinking that he could assist the parties in coming to a settlement of their differences."<sup>1</sup>

**Explanatory Paper written by Agreement of Parties.** — The foregoing rules forbidding explanation by an arbitrator are of such a nature that they may be dispensed with by the parties, if they mutually agree so to do. The rules are established only for the protection of the disputants, to save either of them from protracted litigation at the sole will of the other. But this protection may be abandoned if both are agreed in doing so. Thus it has been held that where there was consent of the parties that the referees should execute an explanatory paper in order to make clear a certain doubtful matter in their award, and the parties further expressed their satisfaction after the document had been executed, this supplementary document constituted a part of the determination, and "the whole was to be taken together as making one award."<sup>2</sup>

**The Arbitrator's Testimony concerning Extrinsic Facts.** — But though an arbitrator cannot be heard to explain the meaning which he intended that his language should bear, or to declare what he meant to say, yet, since extrinsic facts alluded to in an award must often be established in order to render it intelligible, he may be allowed to state these. Thus if an award relates to a boundary line, and a monument is mentioned, the testimony of the arbitrator would be properly admissible for

<sup>1</sup> *Holgate v. Killick*, 7 Hurl. & Nor. 418.

<sup>2</sup> *Eveleth v. Chase*, 17 Mass. 458.



the purpose of showing the situation of that monument, if it was not described in the award.

A submission left it to the arbitrators to run a contested boundary line, but stipulated that they should be "governed by the original tier line from the south side of the town lots, at the north corner of Nos. 7 and 16 of the town lots, to the line of C.'s patent; and that the corner of said lots Nos. 11 and 12 be established accordingly by said arbitrators." The award simply described a boundary line "beginning at a stake," &c., describing its location and giving the courses and distances. It was objected that the arbitrators were in fact limited in their power to determining where the "original tier line ran," and that the award did not show that they had done otherwise than simply run a line. It was apparently the view of the counsel of the impeaching party that he ought to be allowed to show that the line described in the award and the original tier line were not coincident. At the trial one of the arbitrators, who was a surveyor, was allowed to testify as to the manner in which the line was run: that the arbitrators ran it according to the original tier line as they ascertained it to their satisfaction, to the north line of C.'s patent; that they had no difficulty in satisfying themselves as to the true tier line; that they found all the possessions corresponding with it, until they arrived at the premises in dispute; that they established the line thus run, and set up a corner between lots Nos. 11 and 12 on the north line of C.'s patent, both parties being present and neither objecting; that there was a certain quantity of land on one side of the line, and a certain other quantity on the other, of which the defendant was in possession. The court said that this parol testimony of the arbitrator "in explanation of the award was not objected to, and it was clearly competent for the purpose of showing its actual location and operation."<sup>1</sup>

**Testimony of Referee as to Facts and Grounds of Decision.** — "Formerly," said Chief Justice Shaw, in 1844, "it is believed

<sup>1</sup> Robertson v. M'Niel, 12 Wend. 578.

that it was not infrequent to call upon referees to testify to the facts and grounds upon which they had given their judgment, with the purpose of enabling the court to judge of the correctness of their inferences of fact and conclusions of law, with a view to prevent the acceptance of their report. But we think it contrary to the principle on which such references proceed, and opposed by the most recent and satisfactory decisions.”<sup>1</sup> Again, in 1853, the same judge said: “Formerly, but within the recollection of several of us, it was the practice in cases of controverted awards to call before the court one or more of the referees, and inquire of them as to the grounds of their award, as well in matters of law as of fact. This practice has long been set aside.”<sup>2</sup>

In another case, arising in the same State, the testimony of arbitrators as to their proceedings and the grounds on which they made their award, was held to be inadmissible, so far as it tended to impeach the award. Though what was the nature of the facts which the arbitrators were in this instance expected to prove is not stated in the meagre report of the cause, which is therefore deprived of much of its value as an authority.<sup>3</sup>

In an old case where the award was general, and purported to decide all the matters in difference, the court refused to allow the arbitrator to be called to prove that he had awarded no compensation in respect of a certain claim presented by one of the parties.<sup>4</sup> But a recent Massachusetts case seems to be to a quite contrary effect. The arbitrator was allowed to testify that a certain demand, in suit, had not been included in his award.<sup>5</sup>

**The Arbitrator's Testimony as to Admissions by a Party.**—Admissions made by a party in the course of the proceedings, provided they be not concessions made merely for the

<sup>1</sup> *Ward v. American Bank*, 7 Metc. (Mass.) 486.

<sup>2</sup> *Fairchild v. Adams*, 11 Cush. 549.

<sup>3</sup> *Bigelow v. Maynard*, 4 Cush. 317.

<sup>4</sup> *Shelling v. Farmer*, 1 Strange, 646.

<sup>5</sup> *Hale v. Huse*, 10 Gray, 99. And see *post*, pp. 569, 571.

purpose of peace, may be proved by the testimony of the arbitrator. For the arbitration is neither confidential nor in the nature of a compromise, but is as hostile and adverse a method of procedure as is a suit in the courts.<sup>1</sup>

An interesting decision was rendered by Lord Kenyon on this subject, as follows: A master sued his servant for money had and received. When the action came on for trial the servant offered to suffer a verdict to be taken against himself, provided that his master would produce his books before an arbitrator, and that it should not then be made to appear by the master's checks and entries that the servant had fully accounted. A verdict against the servant was accordingly taken by consent, and the cause was referred, with power to the arbitrator to examine the parties upon oath and to compel a production of the books. The arbitrator, after examining the parties under oath, and the books, awarded in favor of the servant. Afterward the servant brought a suit against his master for maliciously holding him to bail in the aforesaid cause. At the trial the servant's counsel called for the books, and proposed to examine the arbitrator to prove his case. Lord Kenyon, however, refused to permit such examination, saying: "It seems to me the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties themselves, or on an inspection of the books, upon the principle that the parties themselves could not have been examined in the former cause, nor could the plaintiff have been compelled by a judge at *Nisi Prius* to produce his books, and it would be a dangerous thing if such evidence were admitted to prove the arrest in that cause to be malicious, as the arbitrator might have proceeded to cut the knot rather than to unloose it according to the strict rules

<sup>1</sup> *Slack v. Buchanan*, 1 Peake, N. P. C. 7; *Doe d. Lloyd v. Evans*, 3 C. & P. 219; *Westlake v. Collard*, Bull. N. P. 7th ed. 236 b; *Gregory v. Howard*, 3 Esp. 113; *Russell on Arb.*, 3d ed. p. 469.

of law, from a wish to do complete justice between the parties.”<sup>1</sup>

**An Arbitrator cannot testify to his Non-concurrence in the Award.**—It is an imperative rule that an arbitrator who signs a report or award concurs therein. He cannot afterward be heard to say that he did not agree with his fellow-arbitrators, with the object of showing by this testimony that the award was not unanimous, and therefore not valid.<sup>2</sup> He is absolutely concluded by his signature from afterward denying his assent and agreement.

Where one of three arbitrators was called, and his testimony was to the effect that he had signed the award without reading it, but upon the representation of the chairman that it was all right, whereas in fact it differed materially from the award as agreed upon, it was held upon appeal that this testimony should not have been admitted, for that the award could not be affected by these facts. It was said that it would be necessary for the party seeking to impeach the award to show not only all these circumstances, but also that this arbitrator had been induced, by misrepresentation, fraud, or misconduct, to sign a different award from that which he intended to sign.<sup>3</sup>

Testimony of one of two arbitrators was offered to show that in making up the computations preparatory to arriving at the amount of the award, certain items had been omitted, which he intended should be included, and that the omission had escaped his notice until after publication. The evidence was held inadmissible, both upon principle and upon authority.<sup>4</sup>

**The Arbitrator cannot be compelled to state the Grounds of his**

<sup>1</sup> *Habershon v. Troby*, 3 Esp. 38; but see *Thomson v. Austen*, 2 Dowl. & Ry. 358.

<sup>2</sup> *Campbell v. Western*, 3 Paige, 124; *Bigelow v. Maynard*, 4 Cush. 317.

<sup>3</sup> *Withington v. Warren*, 10 Metc. 431; see full statement of this case in the chapter on Mistake in the Award.

<sup>4</sup> *Leavitt v. Comer*, 5 Cush. 129, citing as the authorities *Withington v. Warren*, 10 Metc. (Mass.) 431; *Boston Water Power Company v. Gray*, 6 id. 131. *Phillips v. Evans*, 12 Mee. & W. 309.

**Decision.** — Though it might in any specific case be permissible and effective for the arbitrator to state the grounds of his decision, nevertheless it seems that he cannot be summoned by a party as a witness and compelled to do so against his will. He is privileged to refuse to answer interrogatories of this nature, whether preferred in or out of court, and, if such be his choice, the court will protect him in his privilege.<sup>1</sup>

Though the language used in a case arising in the Court of Chancery in Ireland would tend to show that sometimes the court will itself examine an arbitrator, and perhaps compel him to answer. A bill in equity was filed complaining that no allowance had been made in the award to the plaintiff in respect of a certain guaranty. The court said that the plaintiff might have examined each one of the arbitrators upon the point of whether they had abstained from considering the guaranty on the supposition that it was not within the scope of their jurisdiction, or for any other cause; or whether they had in fact included it in their consideration in making up their award. Lord Chancellor Hart added that, had the case originally come before him, he should have directed a short inquiry to examine the arbitrators upon this single matter.<sup>2</sup>

**In England a Barrister never gives Explanations.** — In England it seems that a certain etiquette prevents a barrister, employed as an arbitrator, from making affidavits in respect of the transactions before him, or in which he personally takes part.<sup>3</sup> Though the propriety of this custom has not gone unquestioned.<sup>4</sup> And even where the arbitrator had expressed his unwillingness to testify voluntarily in explanation of his action, as not being a proper proceeding, but his anxiety to be called

<sup>1</sup> *Kingston v. Kincaid*, 1 Wash. C. C. 448; *Ellis v. Saltau*, 4 C. & P. 327, note; *Johnson v. Durant*, *ibid.*, (*per Mansfield*, C. J.)

<sup>2</sup> *Brophy v. Holmes*, 2 Molloy, 1. See *ante*, p. 566.

<sup>3</sup> *Russell on Arb.*, 3d ed. pp. 472, 473; *Dobson v. Groves*, 6 Q. B. 637; *In re Keene & Atkinson*, Exch. Ap. 16, 1847.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 473.

upon by the court to testify, and was present in court for that purpose, Lord Denman, C. J., refused to call upon him.<sup>1</sup>

The notes of the arbitrator cannot be read in court, upon the same principle, apparently, which excludes his affidavit.<sup>2</sup>

**Testimony of the Arbitrator to show a Mistake in the Award.** — The admissibility of the testimony of an arbitrator to show the existence of a mistake in the award has been already discussed.<sup>3</sup> But it should be remembered that testimony of this description, when competent at all, is admitted not for the purpose of explaining, correcting, or altering the award, but with the view to invalidating it altogether.

The court in Illinois allow an arbitrator to give evidence to impeach his award if there be fraud or mistake. But where three arbitrators testified differently, two saying that they thought a certain item had been inadvertently and unintentionally left out, and the third saying he thought it had been admitted and considered and overcome by other items on the contrary side of the account, it was held that in such a case of doubt, no case was made out for setting aside the award. The arbitrators should all concur in the statement of the existence of the error.<sup>4</sup>

**Testimony that the Award does not express the Arbitrator's Intention.** — In some cases, in England, the arbitrator has been allowed to state that the award, though good at law, does not express or carry out his intentions, and, thereupon, it has been sent back to him for amendment.<sup>5</sup>

**An Arbitrator can and must testify as to the Proceedings before him.** — The privilege of answering or refusing to answer at his option, pertains to the arbitrator only in respect of the basis,

<sup>1</sup> Dobson v. Groves, 6 Q. B. 637; Russell on Arb., 3d ed. pp. 473, 474.

<sup>2</sup> Doe d. Haxby v. Preston, 3 Dowl. & Low. 768; Russell on Arb., 3d ed. p. 473.

<sup>3</sup> Ante, pp. 318, 322, 324, 325, 329, 336-338. And see Leavitt v. Comer, 5 Cush. 129, ante, p. 568.

<sup>4</sup> Pulliam v. Pensoneau, 3 Ill. 375.

<sup>5</sup> Shaw v. Pitt, W. R. 616, June 14, 1856, cited in Russell on Arb., 3d ed. p. 448; Mills v. Bowyers' Society, 3 Kay & J. 66; Walton v. Swanage Pier Company, 10 W. R. 629; Lockwood v. Smith, ib. 628.

grounds, or reasons on which he has arrived at his decision, and made up his award.

Whether he be a professional man or a layman, he has no privilege of secrecy in respect of the proceedings before him, but is frequently called upon to testify as to what took place at the hearings, what matters were or were not presented, and other facts of the like description.<sup>1</sup>

In making good a defence on the ground of the want of authority in the arbitrator to make a certain award, the defendant may call the arbitrator as a witness, to testify as to the time when, and the circumstances under which, the award was made.<sup>2</sup>

They may be examined as to what matters were presented before them, and as to what evidence was adduced.<sup>3</sup> And in suit upon a claim which the defendant insists is barred by an award, they are competent witnesses to the question of whether or not the claim was included in their award.<sup>4</sup>

Russell says that "a narration of mere facts concerning the proceedings in the reference, stands on a very different footing from an explanation of the mode in which the arbitrator has performed his judicial functions; and when no ground of etiquette interposes, there seems no reason why an arbitrator should not depose to them as well as anybody else. Accordingly we find on motions for setting aside awards, or in showing cause against such motions, affidavits of arbitrators are constantly used in the courts of law and equity to explain alleged irregularities, to answer charges of misconduct, to show under what circumstances particular meetings were held, and in what manner the award was executed." <sup>5</sup>

<sup>1</sup> *Vallé v. North Missouri R. R. Co.*, 37 Mis. 445; *In re Williams*, 4 Denio, 194.

<sup>2</sup> *Woodbury v. Northy*, 3 Greenl. 85.

<sup>3</sup> *Spurck v. Crook*, 19 Ill. 415.

<sup>4</sup> *Hale v. Huse*, 10 Gray, 99; see also *Walker v. Walker*, 1 Wins. (N. Car.) No. 1, 259; *York & Cumberland R. R. Co. v. Myers*, 18 How. (U. S.) 246.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 472; *Price v. Williams*, 1 Ves. Jr. 365; *In re*

The evidence of an arbitrator is competent to prove the making of a parol submission, and to state facts concerning the conduct of a party, and showing his assent to be bound by the award.<sup>1</sup>

Also, the arbitrator may testify as to what matters were in difference in the reference;<sup>2</sup> and whether a specific claim was presented before him by a party.<sup>3</sup>

For the subject of testimony of the arbitrator given to show that the award is not co-extensive with the submission, see *ante*, p. 361. For the subject of testimony of the arbitrator offered to correct or explain an uncertainty in the award, see *ante*, p. 435.

Hare, 6 Bing. N. C. 158; 8 Dowl. 71; Kingwell v. Elliott, 7 Dowl. 423; Blundell v. Brettargh, 17 Ves. Jr. 232; Cleesly v. Peese, 8 Moore, 524; Stalworth v. Inns, 13 Mee. & W. 466.

<sup>1</sup> Adams v. Bankhart, 1 Cr. Mee. & Ros. 681.

<sup>2</sup> Ravee v. Farmer, 4 Term, 146; Golightly v. Jellicoe, *ibid.* note; Trimingham v. Trimingham, 4 Nev. & Man. 786.

<sup>3</sup> Martin v. Thornton, 4 Esp. 180.



## CHAPTER XXII.

### PLEADING AND PRACTICE.

Methods of enforcing an award.

An award may be enforced in part only.

Time of instituting suit.

Actions to recover costs.

Recovery of costs by *assumpsit*.

*Assumpsit* will lie upon an award.

*Assumpsit* by assignees of an original party.

Debt will lie upon an award of money.

Action of debt on the arbitration bond.

Action on the bond after an enlargement of time.

An action of covenant on a submission by deed.

Action on the case under an award.

Interest on a sum awarded.

Averments in pleading an award.

Setting forth the award in the plaintiff's declaration.

Pleading on a *parol* award.

No *profert* of the award need be made.

Averment of notice.

Averment of a demand before suit brought.

Averment of a request of performance.

The pleadings in an action of debt on an arbitration bond.

Availing of an award by way of defence: extinction of the original claim: plea in bar.

Plea of "no award."

Pleading that all matters are not decided.

Pleading misconduct, fraud, or mistake of the arbitrator.

Pleading illegality in the matter submitted.

Pleading performance of the award.

Pleading the Statute of Limitations.

Pleading revocation of the submission.

Pleading foreign attachment.

Pleading an oral waiver.

Plea that award was not ready in time.

Plea that the cause of action was not submitted.

Defence in suit on a promissory note.

Demurrer in suit on an award.

Execution of the submission must be proved.

Proving the existence and contents of a lost submission.

Part performance of award is evidence of submission.

Statements of a party as evidence.

Evidence of fraud.

Enforcing specific performance of an award by proceedings in equity.

Acquiescence as a preliminary to a decree for specific performance.

A penalty does not take the place of performance.

Right to specific performance as affected by lapse of time.

No specific performance of illegal matters.

Enforcement of unreasonable orders.

Enforcement of specific performance by and against strangers.

Demurrer to a bill for specific performance.

Sustaining an award by injunction.

Pleading an award in bar to a bill in equity.

Vacating an award by motion.

Discovery of new matter as a ground of a motion to set aside an award.

The element of time in connection with new evidence.

Effect of vacating a report in a *lis pendens*.

The English rule as to setting aside an award by proceedings in equity.

The American rule as to setting aside an award by proceedings in equity.

Charges in the bill.

Demurrer to the bill.

Making an arbitrator a defendant.

[NOTE. — The cases which have arisen in the United States upon points of pleading and practice are comparatively few, and such as are encountered are very far from being valuable or consistent. The practice in most of our tribunals has been very lax, and even when an effort to apply strict rules has been made, it has too often not assumed a very intelligible shape. Hence it follows that most of the material of this chapter is furnished by the English reports; and I should again acknowledge my obligation to Mr. Russell, the most satisfactory portion of whose work treats of the subjects herein to be discussed.]

**Methods of enforcing an Award.** — A valid award is an instrument both of offence and of defence. It may serve as the basis of a suit, or as an answer to an action. It constitutes a right of action equally whether the submission be by parol, by writing not under seal,<sup>1</sup> by bond,<sup>2</sup> or by deed.<sup>3</sup>

It will generally be the case, that if the submission be made by rule of court, or if by statute or otherwise it be made returnable to court, or if in any other way whatsoever it is brought within the scope of the jurisdiction of the public tribunals, some means will be provided for enforcing it through the customary channels of the law, by judgment and execution or attachment.

<sup>1</sup> *Hodsden v. Harridge*, 2 Saund. 62 b, n.

<sup>2</sup> *Winter v. White*, 3 Moore, 674; *Ferrer v. Oven*, 7 Barn. & Cress. 427.

<sup>3</sup> *Tomlin v. Mayor of Fordwich*, 6 Nev. & Man. 594.

Yet it would seem, from some of the English cases, that even if an award be thus returnable to court and enforceable by the ordinary machinery of the law, yet these methods may be neglected at the option of the successful party, and it may be made the foundation of an action, precisely like an award rendered *in pais* under a submission *in pais*. Such has been distinctly declared to be the law in the United States.

In a cause in Indiana the question was raised, whether, when a suit is pending, and the parties submit to arbitration according to statutory provisions, the successful party can sue on the award? It was contended that in such case the award could be enforced only by having it made a judgment of court in accordance with the statute. The court said: "This doctrine is not tenable. The legislature has not limited the party to this statutory proceeding. He has the same right now that he ever had to maintain an action on the arbitration bond, and on the award. The Statute 9 & 10 Will. III. authorized the parties in an arbitration bond to insert an agreement that their submission should be made a rule of court; but it has never been considered that the statute, by that provision, prevented the parties to such an agreement from proceeding at common law for the non-performance of an award, by an action on the bond or on the award. The same may be said with regard to our statute. If the arbitration bond authorize it, the party may have the agreement to submit made a rule of court, and may have the award made a judgment of the court. But that is not his only remedy for a non-compliance with the award. If he prefer it, the successful party may still resort to the remedy at common law, and sue on the award or on the bond."<sup>1</sup>

Where a submission provides that judgment *may* be entered on the award, the successful party may nevertheless sue upon the award, if he chooses, without having procured an entry of judgment thereon.<sup>2</sup>

<sup>1</sup> Dickerson v. Tyner, 4 Blackf. 253; to the same effect is the language of the court in Burnside v. Whitney, 26 Barb. 632.

<sup>2</sup> Burnside v. Whitney, 24 Barb. 632.

So where the submission provides that judgment on the award may be entered by a certain court of law, it does not preclude a party from resorting instead to the more ample powers of a court of equity, if he deems them more competent to secure and protect his rights.<sup>1</sup> The decision, however, in this cause was in part based upon the provisions of the statute under which the arbitration was entered into, to the effect that its provisions should not be construed to impair, diminish, or in any way affect the power and authority of the Court of Chancery over arbitrators, awards, or parties; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide by an award.

If the submission and award be *in pais*, and not statutory, and sometimes, also, when they are statutory, the only remedy or means of enforcement will be by a proceeding, either at law or equity, instituted upon them as upon any other private contract.<sup>2</sup>

It is not necessary that the award itself should provide any remedy or method of enforcement.<sup>3</sup> So, also, said Lord Hardwicke: "To lay it down as a general rule that arbitrators must particularly point out the method in which their award shall be carried into execution would be too nice, and such a rule would overturn a great number of awards."<sup>4</sup>

Where, under a submission intended to be statutory, the award is void as a statutory award by reason of certain matters being included in it which the statute does not allow to be thus submitted, but both the submission and award would be good *in pais*, suit may still be maintained upon an independent agreement, appended to the original submission, by which the parties bind themselves to perform the award.<sup>5</sup>

<sup>1</sup> *Burnside v. Whitney*, 21 N. Y. 148.

<sup>2</sup> *Kingsley v. Bill*, 9 Mass. 197; *Eaton v. Arnold*, ib. 519; *Shearer v. Mooers*, 19 Pick. 308.

<sup>3</sup> *Lamphire v. Cowan*, 39 Vt. 420.

<sup>4</sup> *Lingood v. Eade*, 2 Atk. 501.

<sup>5</sup> *Hubbell v. Bissell*, 15 Gray, 551.

**An Award may be enforced in Part only.**—In suit upon an award any one out of several articles in it may be singled out for separate enforcement, provided that the article thus selected is so far complete in itself, and so independent of the rest of the award, that this course will work no injustice; but not otherwise.<sup>1</sup>

**Time of instituting Suit.**—An award becomes a cause of action only from the date of its publication. Any action begun prior to that time will be premature.<sup>2</sup>

**Actions to recover Costs.**—If the award gives the costs of the reference to a party without taxing the amount, it is not necessary to have them taxed before instituting an action to recover them, though it seems that they ought to be taxed before the trial.<sup>3</sup>

The necessity of having costs taxed is, however, said to be apparently unnecessary, when the costs of the award paid to the arbitrator are alone sought to be recovered, and it is not suggested that his charges are excessive.<sup>4</sup>

If parties agree to submit to an arbitrator, and there be no arrangement in the submission and no order in the award concerning his charges, it is generally understood that they are to be borne equally. Whence it follows that if one party pays a sum to the arbitrator in discharge of his bill in order to obtain the award, he may recover from the other party one-half of the amount so paid.<sup>5</sup>

In Vermont it has been held that if the award is of the "taxable costs," the taxation must be made, and notice of the

<sup>1</sup> *Lamphire v. Cowan*, 39 Vt. 420; *Schuyler v. Van Der Veer*, 2 Caines, 235; and see *post*, in this chapter, the paragraph entitled Setting forth the Award in the Plaintiff's Declaration; also *post*, p. 580, at bottom.

<sup>2</sup> *Varney v. Brewster*, 14 N. H. 49.

<sup>3</sup> *Holdsworth v. Wilson*, 32 L. J. Q. B., reversing *Holdsworth v. Barsham*, 31 L. J. Q. B. 145; see *Bates v. Townley*, 2 Exch. 152; stated on p. 578.

<sup>4</sup> *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334; *Russell on Arb.*, 3d ed. p. 505.

<sup>5</sup> *Marsack v. Webber*, 6 Hurl. & Nor. 498; and see *Bates v. Townley*, 2 Exch. 152, stated *post* in this chapter, p. 578.

amount thereof given to the party who is to pay the same, before suit can be brought to recover the sum.<sup>1</sup>

**Recovery of Costs by Assumpsit.**—By an agreement of reference which might be made a rule of court, the costs of the reference and award, including the reasonable fees of the arbitrators, were left to the discretion of the arbitrators. They awarded that each party should pay half of the above-named costs. The plaintiff brought *assumpsit*, for money paid for the defendant's use, to recover a moiety of the sum which he had paid to the arbitrator upon taking the award. The court held that if the plaintiff and defendant were jointly liable to the arbitrators for the sum paid by the plaintiff, and that if the award directed that the defendant should pay a definite portion, then the plaintiff, having paid the whole, might recover from the defendant his contributory share; but that the action could not lie here, because the costs of the reference had not been taxed, so that it was uncertain how much the defendant ought to pay to the plaintiff, or whether he ought to pay any thing.<sup>2</sup>

**Assumpsit will lie upon an Award.**—“Anciently,” says Russell, “it was considered that no action could be maintained on a submission not under seal, where the award directed the performance of some collateral act, and not the payment of a sum of money, as, for instance, the executing a release. But even previous to the time of Holt, C. J., the law was laid down as it holds at present, that as every such submission implies mutual promises to perform the award, an action of *assumpsit* may be maintained for the breach of those promises, in case of non-performance, whether the award be to pay money or to do any other act.”<sup>3</sup> The English doctrine has been fully asserted in

<sup>1</sup> Wright v. Smith, 19 Vt. 110.

<sup>2</sup> Bates v. Townley, 2 Exch. 152.

<sup>3</sup> Russell on Arb., 3d ed. p. 506; Hodsden v. Harridge, 2 Saund. 62 b, n.; Purslow v. Baily, 2 Ld. Raym. 1039; Tilford v. French, 1 Sid. 160; Squire v. Grevell, 6 Mod. 34; 2 Ld. Raym. 961; Lupart v. Welson, 11 Mod. 171; Blanchard v. Murray, 15 Vt. 548; Woodbury v. Northy, 3 Greenl. 85; North Yarmouth v. Cumberland, 6 Greenl. 21.

Pennsylvania.<sup>1</sup> The same principle of an implied promise has been asserted also by the court in New York, though not for the express purpose of upholding an action in *assumpsit*.<sup>2</sup>

The parties to a parol submission agreed to abide by the award. It ordered that one should recover of the other a certain sum. The court said that they did not perceive any objection to a recovery by the plaintiff upon a count in *indebitatus assumpsit*. "But if this were more questionable, it would seem that a judgment might well be taken on the count on *insimul computassent*."<sup>3</sup>

If the award directs that money be paid in certain instalments, *assumpsit* will lie for each sum as it falls due; though debt will not lie until the last instalment has become payable. If the submission be by bond, the penalty will be forfeited upon the first neglect in payment of an instalment.<sup>4</sup>

Where two persons of the one part undertake jointly and severally to perform an award, and the arbitrators order one of the two to pay one certain sum, and the other to pay another certain sum, to the other party to the submission, it has been held that an action of *assumpsit* will lie against both jointly, inasmuch as both are jointly liable for the payment of each of the sums respectively ordered to be paid.<sup>5</sup>

Pending a reference by an order in equity one of the parties died. The arbitrator ordered that payment should be made by his executors out of his assets. It was held that *assumpsit* would lie against the executors.<sup>6</sup>

The defendant in an action of *assumpsit*, founded on a sub-

<sup>1</sup> *M'Manus v. M'Culloch*, 6 Watts, 357.

<sup>2</sup> *Efner v. Shaw*, 2 Wend. 567; *Valentine v. Valentine*, 2 Barb. Chy. 430.

<sup>3</sup> *Bates v. Curtis*, 21 Pick. 247; the court, in the last statement, rely upon 1 Tidd's Pract. 756; Lawes's Pleading in Assumpsit, 348; *Keen v. Batshore*, 1 Esp. 194.

<sup>4</sup> *Cooke v. Whorwood*, 2 Saund. 336 *e*; *Rudder v. Price*, 1 H. Bl. 547.

<sup>5</sup> *Mansell v. Burreddge*, 7 Term, 352; and see *Genne v. Tinker*, 3 Lev. 24; *Johnson v. Wilson*, Willes, 248; *Duke of Northumberland v. Errington*, 5 Term, 522.

<sup>6</sup> *Dowse v. Coxe*, 3 Bing. 20.

mission and award, may contest the fact of the submission, of the award, and of notice thereof prior to the institution of the suit; since all these facts are necessary to create the alleged obligation upon his part.<sup>1</sup>

**Assumpsit by Assignees of an Original Party.** — If pending an arbitration a party thereto assigns to a third person his contingent interest under the award, suit cannot be instituted by the assignee in his own name, but must be brought in the name of the original party.<sup>2</sup>

Debts owing to a firm were by deed assigned to a person upon certain trusts, and a power of attorney was executed to him to receive and compound for the same. As attorney for the firm he entered into a submission with one of its debtors concerning matters in difference between this debtor and the firm. It was held that he might enforce the award by an action of *assumpsit* brought in his own name; also that he need not make *profert* of the deed of assignment in his declaration, since it was pleaded merely by way of inducement.<sup>3</sup>

**Debt will lie upon an Award of Money.** — If an award orders one party to pay to the other a sum of money, it creates a debt; and an action of debt, says Russell, might therefore always have been maintained in favor of the payee, although the submission were oral or by writing not under seal.<sup>4</sup> And at the present day an action of debt will lie on an award ordering a payment of money rendered upon a submission by rule of court, or by deed, or by writing without deed, or by parol.<sup>5</sup>

And though the award contain other orders also, for the performance of other collateral acts besides the payment of money, yet the order for payment may be singled out for separate enforcement by an action of debt.<sup>6</sup>

<sup>1</sup> Woodbury v. Northy, 3 Greenl. 85.

<sup>2</sup> Day v. Smith, 1 Dowl. 460.

<sup>3</sup> Banfill v. Leigh, 8 Term, 571.

<sup>4</sup> Russell on Arb., 3d ed. p. 507; Purslow v. Baily, 2 Ld. Raym. 1089; Wright v. Smith, 19 Vt. 110.

<sup>5</sup> Ibid.; Hodsdon v. Harridge, 2 Saund. 62 b, n.

<sup>6</sup> Russell, 3d ed. pp. 507, 508; citing 2 Chitty Plead., 6th ed. p. 258.



M. and B. submitted their differences to arbitrators, who were authorized to determine the amount to be paid, and upon what terms, as to time and security, payment should be made. The arbitrators awarded that M. should pay to B. a certain sum on the 28th July, 1858; a second sum on the 20th January, 1859; and a third sum on the 20th January, 1860; and that to secure the payment of the sums he should give B. a bond with penalty and surety. No bond was given, and B. on the 28th January, 1858, that is, before any of the sums awarded to be paid had fallen due, sued M. in an action of debt. The question was whether this action could be maintained: *held* that it could. "On principle and authority, B. had a right to sue when M. refused to perform any material part of the award." The arbitrators having, in accordance with their authority conferred by the parties, directed the kind of security to be given, M., upon his failure to give that security, was in default, and a cause of action accrued. "The right of action was perfect on M.'s refusal to give the penal bond, as it would have been after the credit allowed by the award had expired."<sup>1</sup>

Six partners entered into two bonds of submission. In one bond three bound themselves jointly and severally to the other three to perform the award which should be rendered respecting all differences between the parties or any of them. The second bond was a counterpart of the first in form, and in it the three last-named partners bound themselves to the three first named. The award ordered one of the three obligors in the former bond to pay to one of his co-obligors a certain sum. It was held that the payee could maintain an action of debt upon the award against the one thus ordered to pay, though no action upon the bond would lie between the two co-obligors therein.<sup>2</sup>

Under the old common law of England an action of debt

<sup>1</sup> Bayne v. Morris, 1 Wall. (U. S.) 97.

<sup>2</sup> Winter v. White, 3 Moore, 674; 1 Ball & Beat. 350.

would not lie against an executor or administrator upon an award rendered under a submission not under seal, entered into by the deceased, since it was said that the deceased might have waged his law, and his personal representative could not.<sup>1</sup> But this has since been changed by statute.<sup>2</sup> And where the executor or administrator was himself the party to the submission, the law has always allowed an action of debt to be maintained against him.<sup>3</sup>

**Action of Debt on the Arbitration Bond.**— If the submission be by bond, an action of debt will lie for the penalty, so soon as it is forfeited by non-performance of the award. Russell remarks that this “is in some respects preferable to an action of debt on the award, since it throws upon the defendant the task of discharging himself from the penalty by showing performance of the condition, and relieves the plaintiff from the burden of proving a mutual submission, which he must allege and prove if traversed, in order to support the latter form of action.”<sup>4</sup>

**Action on the Bond after an Enlargement of Time.**— Where the original submission is by bond, an action thereon may still be maintained in the event of non-performance of the award, though the time has been subsequently enlarged by deed; for altering the condition does not have the effect of defeating the bond.<sup>5</sup>

But if the enlargement of the time for the rendition of the award be extended by an agreement not under seal, and the award be accordingly made after the original time has elapsed and within the substituted time, no action will lie

<sup>1</sup> Russell on Arb., 3d ed. p. 508; *Hampton v. Boyer*, Cro. Eliz. 557; *Bowyer v. Garland*, ib. 600; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Riddell v. Sutton*, 5 Bing. 200; 2 Moore & Pay. 345.

<sup>2</sup> 3 & 4 Will. IV. c. 42, §§ 13, 14.

<sup>3</sup> *Riddell v. Sutton*, 5 Bing. 200.

<sup>4</sup> Russell on Arb., 3d ed. pp. 508, 509; *Ferrer v. Oven*, 7 Barn. & Cress. 427.

<sup>5</sup> *Greig v. Talbot*, 2 Barn. & Cress. 179.

upon the bond. The remedy must be sought by a suit in *assumpsit* based upon the new submission by enlargement.<sup>1</sup>

Where no time is named in the bond for the making of the award, but by a subsequent agreement such time is specified, and the award is published before its expiration, suit may still be brought upon the bond for the penalty thereof.<sup>2</sup>

Where submission is made by bond, and the time named therein for making the award is afterward extended by erasure and interlineation in the bond, without altering the original date of the bond, the proper effect is to destroy the bond as a pre-existing obligation, and to render it a new bond from the time of the alteration. But in declaring upon it, the plaintiff may allege it as of its old date only, or as dated upon that day, but taking effect afterward, at his option.<sup>3</sup>

**An Action of Covenant on a Submission by Deed.** — If the submission has been entered into by deed, an action of covenant will lie for the breach or non-performance of any part of the award.<sup>4</sup>

Where the defendant has revoked the submission, and an award has nevertheless been made, it is said that there seems to be no objection, in an action of *assumpsit* or of covenant on the submission, to joining a count for the revocation with a count on the award; and the judge at *Nisi Prius* will not compel the plaintiff to elect upon which count he will rely at the trial. If the defendant prove the revocation in order to defeat the count on the award, then the plaintiff may recover damages on the latter count.<sup>5</sup>

**Action on the Case under an Award.** — Where a drain runs across the lands of several different proprietors who are ordered

<sup>1</sup> *Brown v. Goodman*, 3 Term, 592, notes.

<sup>2</sup> *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125.

<sup>3</sup> *Tompkins v. Corwin*, 9 Cow. 255.

<sup>4</sup> *Tomlin v. Mayor of Fordwich*, 6 Nev. & Man. 594; *Charnley v. Winstanley*, 5 East, 266; *Marsh v. Bulteel*, 5 Barn. & Ald. 507; *Russell on Arb.*, 3d ed. pp. 509, 510.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 510; *Brown v. Tanner*, 1 Carr. & Pay. 651; *M'Lel. & Y.* 464; *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

by commissioners to keep their respective proportions of it cleansed, and in a fit state to conduct off the water, if one of them neglects to do so, an action on the case seems to be the proper remedy to be availed of by any other owner, who has been injured by the default, against the delinquent.<sup>1</sup>

**Interest on a Sum awarded.** — If an award order a sum of money, due on a balance of account, to be paid at a certain time and place, if the amount be duly demanded by the payee at that time and place, he may afterward recover interest thereon in his subsequent action brought on the award to recover the principal.<sup>2</sup>

If no time of payment be specified, interest will begin to run from the time of demand.<sup>3</sup>

The English rule of practice will allow interest to be recovered only in an action,<sup>4</sup> and not on a motion for an attachment;<sup>5</sup> nor on an execution issued on a judgment entered up pursuant to the award;<sup>6</sup> nor on an execution issued under Statute 1 & 2 Vict. c. 110.<sup>7</sup>

**Averments in pleading an Award.** — The fact that a mutual submission has been entered into must be averred in pleading an award either in a declaration or by way of defence. But the submission need not be set out at length, provided the substance and legal effect of it are given.<sup>8</sup> Though, if it so binds the parties that they incur peculiar liabilities under it, the better course is to set it forth in terms or to recite its substance very fully.<sup>9</sup> But it must sufficiently appear that the agreement to submit was valid and binding in law, or the

<sup>1</sup> *Sharpe v. Hancock*, 7 Man. & Gr. 354.

<sup>2</sup> *Pinhorn v. Tuckington*, 3 Camp. 468.

<sup>3</sup> *Johnson v. Durant*, 4 Carr. & Pay. 327.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 512.

*Churcher v. Stringer*, 2 Barn. & Ad. 777.

<sup>6</sup> *Lee v. Lingard*, 1 East, 400.

<sup>7</sup> *Doe d. Moody v. Squire*, 2 Dowl. n. s. 327.

<sup>8</sup> *Russell on Arb.*, 3d ed. p. 513; *Hodsden v. Harridge*, 2 Saund. 61 *m*, notes, 61 *n*.

<sup>9</sup> *Mansell v. Burreddge*, 7 Term, 352.

award rendered in pursuance of it cannot be supported, and the pleading will be bad on demurrer.<sup>1</sup>

Though the submission has been made by an order of court, it is not necessary to aver this fact.<sup>2</sup>

It is not sufficient to allege the award to have been duly made in pursuance of the submission. Recitals in the pleadings must show that all formal requisites, such as writing, sealing, and the like, have been complied with.<sup>3</sup> Also that all orders made in the award are within the scope of the submission.<sup>4</sup>

So also it must be stated to have been made within the time limited.<sup>5</sup> Where the submission stipulates for a readiness to deliver, this fact is customarily averred.<sup>6</sup> But an averment that the award was made, will generally be enough, for this implies a readiness to deliver.<sup>7</sup>

If the award was not ready, it is said that the defendant might probably show the fact in evidence under a plea of no award.<sup>8</sup>

If two arbitrators are empowered to appoint a third by writing indorsed upon the submission, it must be specifically averred that they made their appointment by writing so indorsed; or the pleading will be held insufficient and bad upon a general demurrer.<sup>9</sup>

<sup>1</sup> Russell on Arb., 3d ed. p. 513; *Biddell v. Dowse*, 6 Barn. & Cress. 255.

<sup>2</sup> *Roper v. Levi*, 21 L. J. Exch. 28.

<sup>3</sup> Russell on Arb., 3d ed. p. 514; *Everard v. Paterson*, 2 Marsh. 304; *Henderson v. Williamson*, 1 Strange, 116; *Hinton v. Cray*, 3 Keb. 512; *Wilson v. Constable*, 1 Lutw. 536.

<sup>4</sup> *Pascoe v. Pascoe*, 3 Bing. N. C. 898; Russell on Arb., p. 515.

<sup>5</sup> Russell, *ubi supra*; *Skinner v. Andrews*, 1 Saund. 169; 1 Lev. 245; 2 Keb. 361, 388; 1 Sid. 370; *Bissex v. Bissex*, 3 Bur. 1730; Bac. Abr. Arb., G.

<sup>6</sup> Russell, *ubi supra*.

<sup>7</sup> *Rowsby v. Manning*, 3 Mod. 331; *Carth. 158*; 1 Show. 98, 242; *Doyley v. Burton*, 1 Ld. Raym. 533; *Anon.* 2 id. 989; *Busfield v. Busfield*, Cro. Jac. 577; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Bradsey v. Clyston*, Cro. Car. 541; *Robison v. Calwood*, 6 Mod. 82; *Marks v. Marriot*, 1 Ld. Raym. 114; *Oates v. Bromhill*, 6 Mod. 176; 1 Salk. 75; *Jenkinson v. Allisson*, 1 Freem. 415; *contra*, the same case, 3 Keb. 513.

<sup>8</sup> *Dresser v. Stansfield*, 14 Mee. & W. 822.

<sup>9</sup> *Bates v. Townley*, 1 Exch. 572.

In declaring in an action in *assumpsit* where the submission is not by a sealed instrument, mutual promises to perform the award must be averred.<sup>1</sup> Though, as has been already stated, such promises are implied from the fact of submission.<sup>2</sup> But the rule is precisely the contrary in declaring in an action of debt, in which case it is not only needless, but erroneous, to aver mutual promises; for to do so would be to make the action one of debt to perform the award when made, not of debt on the award itself.<sup>3</sup>

If the submission stipulates that the award shall be ready for delivery at a certain time and place, averment of a delivery actually made to the parties within the time at another place is sufficient.<sup>4</sup>

It is well to aver the award to have been made "of and concerning the premises;" for the court will then intend that the arbitrator has decided all the matters submitted until the contrary be made to appear.<sup>5</sup>

In declaring upon an award averments may be made to show the nature of the controversies submitted, and to explain what does not sufficiently appear upon the face of the submission, so as to enable the court to ascertain the true object of the submission.<sup>6</sup>

When invalidity of the award can be pleaded at all, it must be pleaded with explicitness and accuracy. Thus, a plea that an award is invalid for want of certainty, finality, mutuality, or other essential requisite, but not setting forth fully and distinctly wherein and how this fault exists, is bad for generality.<sup>7</sup> An exception "to each and every one of the decisions and

<sup>1</sup> *Lupart v. Welson*, 11 Mod. 171.

<sup>2</sup> *Ibid.*; *ante*, pp. 578, 579.

<sup>3</sup> *Sutcliffe v. Brooke*, 15 L. J. Exch. 118; 3 Dowl. & Low. 302.

<sup>4</sup> *Elborough v. Gates*, 2 Lev. 68.

<sup>5</sup> *Craven v. Craven*, 7 Taunt. 642; *Doyley v. Burton*, 1 Ld. Raym. 533.

<sup>6</sup> *Garr v. Gomez*, 9 Wend. 649.

<sup>7</sup> *Williams v. Paschall's Heirs*, 3 Yeates, 564; *Hartshorne v. Cuttrel*, 1 Green's Ch. 297; *Bean v. Farnam*, 6 Pick. 269.

rulings of the referee against the plaintiff, on the trial of the action, severally, separately, and distinctively," was designated by the court as "useless verbiage."<sup>1</sup> "As much certainty is necessary," said Judge Bristol, "in remonstrances against the award of auditors as in pleading."<sup>2</sup>

In suit on an award an allegation, generally, that the award was based upon false and corrupt testimony, procured and laid before the arbitrators, in the absence of any allegation of fraud, corruption, misconduct, or even mistake, on the part of the arbitrators themselves, is bad. For to try the issue presented by it would be to inquire whether the arbitrators arrived at just conclusions upon the testimony. The question whether any portion of it was false is involved in those passed upon and settled by the arbitrators, and to determine it now would be to try the case over again. It was added that the proper exception to be taken, if any, was on the ground of newly discovered evidence.<sup>3</sup>

**Setting forth the Award in the Plaintiff's Declaration.**—Russell says that in an action on the award no more of the award need be set forth in the declaration than is necessary in order to support the plaintiff's claim in the action. It may be stated that the arbitrator, "among other things, awarded," &c. Then if the award be defective on its face, or contain any thing by way of condition precedent to performance by the defendant, the defendant must set it forth in his plea. But if the action be upon the arbitration bond, the plaintiff must, in his declaration or replication, set forth the whole award, or at least so much of it as is good and valid, or there will be a fatal variance in the proof.<sup>4</sup>

<sup>1</sup> *Newell v. Doty*, 33 N. Y. 83.

<sup>2</sup> *Maples v. Avery*, 6 Conn. 20.

<sup>3</sup> *Pickering v. Pickering*, 19 N. H. 389.

<sup>4</sup> *Russell on Arb.*, 3d ed. pp. 516, 519; *Perry v. Nicholson*, 1 Burr. 278; *Leake v. Butler*, Litt. 312; *Smith v. Kirfoot*, 1 Leon. 72; *Wood v. Wilson*, 2 Cr., Mee. & Ros. 241; *Tilford v. French*, 1 Sid. 160; *Foreland v. Marygold*, 1 Salk. 72; *Furlong v. Thornigold*, 12 Mod. 533; *per* Ld. Denman, C. J., in *Tomlin v. Mayor of Fordwich*, 6 Nev. & Man. 594.

In declaring on an award the whole need not be set forth, but that part only upon which the party relies. The averment may be that "among other things" the arbitrators awarded, &c.<sup>1</sup>

**Pleading on a Parol Award.**—A parol award need not be pleaded in the exact language of the arbitrators, but is sufficiently stated if the effect and substance only be given.<sup>2</sup>

**No Profert of the Award need be made.**—An award, though indented and under the hand and seal of the arbitrator, is no deed or specialty, but only a writing under seal, unless, indeed, it has been delivered by the arbitrator as a deed. Whence it follows that no *profert* need be made of it in pleading.<sup>3</sup>

**Averment of Notice.**—No averment of notice need be made, for unless the submission contain a specific stipulation requiring it to be given, both parties alike will be bound to take notice of the fact of the making of the award.<sup>4</sup>

But those courts of the United States in which this question has arisen seem to be divided as to the necessity of notice. It has been held in Maine that before suit can be brought upon an award it should be notified to the party to be sued.<sup>5</sup> Where this doctrine prevails, it is probable that notice should be averred. In New Hampshire the English doctrine prevails, and notice is said to be unnecessary as preliminary to the right of action.<sup>6</sup>

**Averment of a Demand before Suit brought.**—A demand is necessary to sustain an action on an award only where the award is for the payment of money "*on request*," or is other-

<sup>1</sup> *Blanchard v. Murray*, 15 Vt. 548; *Finley v. Finley*, 11 Mis. 624.

<sup>2</sup> *Hanson v. Liversedge*, 2 Vent. 242; *Thomlinson v. Arriskin*, 1 Com. R. 329.

<sup>3</sup> *Dod v. Herbert*, Sty. 459; *Perry v. Nicholson*, 1 Burr. 278; *Hodsden v. Harridge*, 2 Saund. 62 b, n.; *Russell on Arb.*, 3d ed. p. 516.

<sup>4</sup> *Russell on Arb.*, 3d ed. pp. 516, 517; *Fraunce's Case*, 8 Rep. 92 b; *Hodsden v. Harridge*, 2 Saund. 62, n. 4; *Child v. Horden*, 2 Bulstr. 144; *Gable v. Moss*, 1 id. 44; *Juxon v. Thornhill*, Cro. Car. 132; and see *Brooke v. Mitchell*, 6 Mee. & W. 473.

<sup>5</sup> *Woodbury v. Northy*, 3 Greenl. 85; and see *Wright v. Smith*, 19 Vt. 110.

<sup>6</sup> *Houghton v. Burroughs*, 18 N. H. 499.



wise made in some shape conditional.<sup>1</sup> Where the demand is necessary, it should of course be averred; but otherwise if it be not necessary.

If the action be upon the bond, and the condition be simply to pay such sum as shall be awarded, no demand is necessary as preliminary to the institution of a suit where the award directs payment of an amount named.<sup>2</sup>

**Averment of a Request for Performance.** — Generally a request for performance, unless the award direct the act to be done "upon request," is needless, and of course need not be averred.<sup>3</sup> So, also, though a time and place of performance be named; for readiness to perform then and there is only a matter of defence.<sup>4</sup> Though, if the plaintiff is required to do a concurrent act, then he must aver his presence at the nominated time and place and his readiness to perform on his part.<sup>5</sup>

**The Pleadings in an Action of Debt on an Arbitration Bond.** — It has been already said that in an action of debt on the arbitration bond the plaintiff must, in his declaration or replication, set forth the whole, or at least all the valid portion, of the award.<sup>6</sup>

If the award be not set out in the declaration, and the defendant plead no award made, it is incumbent upon the plaintiff, in his replication, not only to set out the award, but also to assign a breach thereof.<sup>7</sup> Though this breach, when assigned, is not issuable, nor traversable, nor can the

<sup>1</sup> *Parsons v. Aldrich*, 6 N. H. 264; *Plummer v. Morrill*, 48 Maine, 184; *Thompson v. Mitchell*, 35 id. 281.

<sup>2</sup> *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 517; *Waters v. Bridge*, Cro. Jac. 639.

<sup>4</sup> *Russell, ubi supra*; *Rowe v. Young*, 2 Ball & Beatty, 165, *per* Bailey, J., 233; *Lambard v. Kingsford*, Lutw. 558; *Rodham v. Stroher*, 3 Keb. 830.

<sup>5</sup> *Rowe v. Young*, 2 Ball & Beatty, 165, *per* Bailey J., 234; *Phillips v. Knightly*, 1 Barn. 84; *Fitzg.* 53.

<sup>6</sup> *Ante*, p. 587.

<sup>7</sup> *Meredith v. Alleyn*, 1 Salk. 138; *Hayman v. Jerrard*, 1 Saund. 102; Com. Dig. Pleader, F. 14; *Shelley v. Wright*, Willes, 9; *Barret v. Fletcher*, Yelv. 152; *Lee v. Elkins*, 12 Mod. 585; *Ormelade v. Coke*, Cro. Jac. 354; *Russell on Arb.*, 3d ed. p. 520.

defendant give any answer to it.<sup>1</sup> Nevertheless the want of assigning a breach is matter of substance and bad on general demurrer.<sup>2</sup> So also if the plaintiff assign a bad breach; nor will this be aided after verdict.<sup>3</sup>

If the defendant plead in effect traversing the submission, or any other collateral matter, the plaintiff may join issue thereon without assigning a breach.<sup>4</sup> So if the defendant show an award, and plead performance of part only, and the plaintiff takes issue thereon.<sup>5</sup> If the defendant plead any plea admitting the award and excusing non-performance, it is sufficient for the plaintiff to answer the special matter thus alleged, without assigning a breach.<sup>6</sup>

If the defendant pleads no award, and the plaintiff in his replication sets out an award, *semble* that the replication should conclude with a verification.<sup>7</sup> Though if the defendant set out part only of the award, and aver performance, and the award as set out be bad, and the plaintiff in his replication set out the rest of the award, it is a question whether the conclusion should be by a verification or to the country.<sup>8</sup>

**Availing of an Award by Way of Defence: Extinction of the Original Claim: Plea in Bar.** — According to the old rule in England, before it had been interfered with by legislative enactments, an award might generally have been given in evidence under the general issue, in an action on the original demand. The rule established by the old cases was that

<sup>1</sup> *Heard v. Baskerville*, Hob. 232; *Brickhead v. Archbishop of York*, Hob. 197.

<sup>2</sup> *Barret v. Fletcher*, Cro. Jac. 220; *Yelv.* 152; *Heard v. Baskerville*, Hob. 232; *Brickhead v. Archbishop of York*, Hob. 197.

<sup>3</sup> *Pit v. Wardal*, *Godbold*, 164.

<sup>4</sup> *Com. Dig. Plead.*, F. 15; *Bac. Abr. Arb.*, G.; *Kind v. Carter*, 1 Sid. 290; *Strike v. Benstey*, 1 Lutw. 525.

<sup>5</sup> *Genne v. Tinker*, 3 Lev. 24; *Com. Dig. Plead.*, F. 15.

<sup>6</sup> *Jeffrey v. Guy*, *Yelv.* 78.

<sup>7</sup> *Russell on Arb.*, 3d ed. p. 251; *Fisher v. Pimbley*, 11 East, 188; *Veale v. Warner*, 1 Saund. 326 b, n. 1 h.

<sup>8</sup> *Russell on Arb.*, 3d ed. pp. 521, 522; *Veale v. Warner*, *ubi supra*; and see *Seal v. Crowe*, 3 Lev. 164.

“ whenever the award gives a new duty in lieu of the former, or awards any collateral matter in satisfaction of the debt or grievance, it may be pleaded in bar, without any averment of performance.”<sup>1</sup> For the other party, if any thing be awarded in his favor in the award, has his independent remedy, by himself instituting another suit on the award.<sup>2</sup> The modern doctrine is very well laid down by Mr. Russell in the following language, which I cannot do better than quote at length : “ If an action be brought for a debt, whether the form be debt or *assumpsit*, an award respecting the claim, ascertaining the amount of the debt, and directing payment, cannot be pleaded in bar to the action without alleging performance; for the money, until paid, is due in respect of the original debt: as for instance, if the claim be for tolls, the sum awarded is due for tolls still.<sup>3</sup> But if the claim be of a different nature, as, for example, to have goods delivered, and the award direct payment of money in satisfaction of the demand, the right to have the goods seems to be gone, and the only right remaining is the substituted right to have the money awarded. So, if the demand be for a debt, and the award direct not payment in money, but payment in a collateral way, as by delivery of goods or performance of work, it seems the right to have payment in money is extinguished. In like manner, if the claim be for unliquidated damages, an award of a sum certain in satisfaction is, it is apprehended, a good bar without alleging performance.”<sup>4</sup> The original claim is either not extinguished at all, or is extinguished altogether.

<sup>1</sup> Russell on Arb., 3d ed. pp. 522, 523; *Gascoyne v. Edwards*, 1 Younge & Jer. 19; *Crofts v. Harris*, Carth. 187; *Freeman v. Bernard*, 1 Salk. 69; 1 Ld. Raym. 247; *Purslow v. Bailey*, 1 Salk. 76; 6 Mod. 221; 2 Ld. Raym. 1089; *Allen v. Harris*, 1 id. 122.

<sup>2</sup> See *ante*, p. 555; *Loring v. Whittemore*, 15 Gray, 228.

<sup>3</sup> See, to the same substantial effect, *Keeler v. Harding*, 23 Ark. 697, stated in Chap. XVIII., in the paragraph entitled A Case where the Merger is not effected, *ante*, pp. 490, 491.

<sup>4</sup> Russell on Arb., 3d ed. p. 524.

In all actions where an accord and satisfaction is a good defence, an award may be pleaded in bar.<sup>1</sup>

If, after issue joined, a cause be referred, and the plaintiff still proceeds with the action, and, after an award in the plaintiff's favor, brings it in for trial, the award may be pleaded as a plea to the further maintenance of the action; formerly it was by way of plea *puis darrein continuance*. It seems that such an award is, at common law, inadmissible in evidence, and that, therefore, the defendant must plead it or lose the benefit of it.<sup>2</sup>

**Plea of "no Award."**—Russell says that the old rule in England construed a plea of no award made as meaning strictly that no award at all had been made. Wherefore, if the defendant pleaded thus, and the plaintiff replied by setting out an award and assigning a breach, and the defendant rejoined matter, showing that though there was an award in fact it was void in law, he committed a departure. His proper course would have been in the first instance to plead the award, and then to aver the matter rendering it void. The only allowable rejoinder in the aforesaid pleadings would be a denial that the arbitrator made any such award.<sup>3</sup>

But in a later case this doctrine has been overruled. The action was in debt on an arbitration bond. The defendant, after craving oyer of the bond and condition, by which it appeared that the bond was conditioned to abide an award on all causes of action, controversies, and demands between the plaintiff and defendant, pleaded no award made. The plaintiff replied that an award was duly made ordering the defendant

<sup>1</sup> Russell on Arb., 3d ed. p. 525; Blake's Case, 6 Rep. 43 b; Com. Dig. Accord., D. 1; Bac. Abr. Arb., G.

<sup>2</sup> Russell, p. 525; Lowes v. Kermode, 8 Taunt. 146; Storey v. Bloxham, 2 Esp. 503.

<sup>3</sup> Russell on Arb., 3d ed. pp. 526, 527; House v. Launder, 1 Lev. 85; Harding v. Holmes, 1 Wils. 122; Morgan v. Man, 1 Lev. 127; T. Raym. 94; Roberts v. Marriot, 2 Saund. 183; 1 Lev. 300; Skinner v. Andrews, 1 Lev. 245; Roberts v. Eberhardt, 27 L. J. C. P. 70, reversed in error, 2 id. 74.

to pay to him a certain sum "for all the coal gotten by him as thereinbefore mentioned." The defendant rejoined and set out the whole award verbatim, by which it appeared the submission was of matters in difference between the plaintiff and defendant, and the award found damages for the plaintiff in respect of coal belonging to the plaintiff, *or to the plaintiff and others with him*. The plaintiff demurred. The court held the rejoinder to be no departure from the plea, for that the plea meant that no legal and valid award according to the submission had been made, and the rejoinder, showing the award to be invalid, merely maintained that plea. Bailey, J., expressed the opinion that the defendant could not have defended himself by taking issue on the replication; for there was such an award as the plaintiff therein set up, though there was not an award conformable to the submission, and therefore no good award. The court further held that, had the award been truly set out in the replication, the defendant ought then to have demurred to it; but as the replication set it out only partially, the defendant was therefore entitled to set it out truly in his rejoinder, and on demurrer to object to its validity.<sup>1</sup>

In an action of debt on an arbitration bond the defendant pleaded no award. The plaintiff replied, setting forth an award. The defendant rejoined that the award was not final. The plaintiff demurred. The court held the rejoinder to be a departure.<sup>2</sup>

In an action of debt on the arbitration bond, the defendant pleaded the condition of the bond, set forth the award, and averred that a question included in the submission and notified to the arbitrators had not been awarded upon. The plaintiff demurred, and the court held the plea good.<sup>3</sup>

If a bond is conditioned to abide an award of arbitrators,

<sup>1</sup> Fisher v. Pimbley, 11 East, 188; see Hickes v. Cracknell, 3 Mee. & W. 72; Spooner v. Payne, 16 L. J. C. P. 225.

<sup>2</sup> Barlow v. Todd, 3 Johns. 367.

<sup>3</sup> Mitchell v. Staveley, 16 East, 58.

and, if not made within a certain time, then of an umpire, the plea of no award should allege that none was made either by the arbitrators or by the umpire.<sup>1</sup>

After a plea of no award and a replication setting out an award ordering a payment of money and averring non-payment, a rejoinder of payment is a departure.<sup>2</sup>

If it is intended to dispute the validity of an award on the ground of its non-conformity with the submission, a plea that no award was made according to the terms of the submission is bad. For it neither denies the award declared, nor does it confess and avoid. Even if it could be regarded as confessing, yet it avoids, if at all, only argumentatively.<sup>3</sup>

Russell says<sup>4</sup> that according to the later cases, if an issue is joined on a traverse to a plea of no award, the defendant may show either that no award at all has been made, or that the arbitrators did not execute the award together,<sup>5</sup> or that the award was not made within the limit of time set forth in the declaration, or that a matter submitted and notified to the arbitrator was not determined by him.<sup>6</sup> Special pleas setting forth the latter objections have been held bad on special demurrer, as being argumentative pleas of no award.<sup>7</sup>

But a defendant in an action on an award cannot support a plea of no award, by showing that though an award has been made pursuant to the submission, yet this award is in fact bad or void.<sup>8</sup> For example, he will fail on such an issue if he rely on the fact that an award, made in accordance with the sub-

<sup>1</sup> *Hinton v. Cray*, 3 Keb. 512.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Bean v. Farnam*, 6 Pick. 269.

<sup>4</sup> Russell on Arb., 3d ed. p. 529.

<sup>5</sup> *Wade v. Dowling*, 4 El. & Bl. 44.

<sup>6</sup> *Harrison v. Creswick*, 13 C. B. 399; *Roberts v. Eberhardt*, 27 L. J. C. P. 70; 3 C. B. N. s. 482; *King v. Bowen*, 8 Mee. & W. 625; *Elsom v. Rolfe*, 2 Smith, 459.

<sup>7</sup> *Dresser v. Stansfield*, 14 Mee. & W. 822; *Armitage v. Coates*, 4 Exch. 641; *Linsey v. Ashton*, Godbold, 255.

<sup>8</sup> Russell on Arb., 8d ed. p. 529.

mission, is bad, because it shows on its face that the arbitrator has exceeded the scope of his authority,<sup>1</sup> or that the arbitrators made up the award without exercising their own judgment, but by the opinion of a third person by which they had agreed beforehand to be bound.<sup>2</sup> Neither upon such an issue is it permissible to the defendant to show that the award has been set aside; for this fact ought to be pleaded.<sup>3</sup>

**Pleading that all Matters are not decided.**—An objection to the award that it does not determine all the matters submitted, and to which the attention of the arbitrators was called, can always be pleaded as a defence in a suit at law upon the award.<sup>4</sup>

**Pleading Misconduct, Fraud, or Mistake of the Arbitrators.**—The method of availing of the misconduct, fraud, or mistake of the arbitrators has been already in some measure discussed in Chapter XIX. The general rule is that such matters cannot be pleaded in defence to a suit at law on the award. They are matters *dehors* the award, and, by a familiar principle, evidence of them cannot be adduced in an action in which the award is pleaded and relied upon.<sup>5</sup> They, however, constitute a proper cause for a bill in equity, which may pray that the award be declared void, and also that the further prosecution of any action begun upon it may be enjoined.<sup>6</sup>

In an action of debt on an arbitration bond the defendant pleaded, among other things, misconduct and mistake on the part of the arbitrator. To these pleas the plaintiff demurred,

<sup>1</sup> *Adcock v. Wood*, 6 Exch. 814.

<sup>2</sup> *Whitmore v. Smith*, in error, 7 Hurl. & Nor. 509; 31 L. J. Exch. 107, reversing the judgment of the Court of Exchequer, reported in 5 Hurl. & Nor. 824; 29 L. J. Exch. 402.

<sup>3</sup> *Roper v. Levi*, 21 L. J. Exch. 28.

<sup>4</sup> *Mickles v. Thayer*, 14 Allen, 114; *Bean v. Farnam*, 6 Pick. 269; *Inhabitants of North Yarmouth v. Inhabitants of Cumberland*, 6 Maine, 21; *Sharp v. Woodbury*, 18 Iowa, 195.

<sup>5</sup> *Fletcher v. Hubbard*, 43 N. H. 58; see also *post*, in this chapter, Evidence of Fraud.

<sup>6</sup> *Sisk v. Garey*, 27 Md. 401.

and his demurrer was held good, on the ground that misconduct and mistake could not be thus availed of, but that relief must be sought in equity. The rule was said to be too firmly settled to leave room for entertaining any question as to how far it might be judicious.<sup>1</sup>

The following case decided in the supreme court of the State of Maine constitutes an exception to the foregoing rules, which, but for it, would, I believe, be of universal operation. A defendant set up in defence a submission and award; the plaintiff sought to avoid the effect thereof on the ground of misconduct, partiality, or fraud in procuring or making it, by a party or by the referees. The plaintiff accordingly demurred, professing to believe that evidence sufficient to show the fraud, partiality, or collusion could be obtained from a critical examination of the papers in the case. But it was said that the proper course would have been to reply the fraud and bring that question to an issue to be decided in the light of evidence to be offered by both parties. "Whether an award is void by reason of fraud in the parties, or corruption, gross partiality, or prejudice on the part of the arbitrators, is not a question of law to be determined upon a demurrer to a plea, but a question of fact, to be submitted, if the parties desire it, to a jury, with an opportunity to the party whose award is impeached to explain by testimony any circumstances on the face of the proceedings that might tend to excite suspicion of unfair practices."<sup>2</sup>

**Pleading Illegality in the Matter submitted.**—If the award of arbitrators is not impeached on the ground of their partiality or corruption, or of fraud practised by the prevailing party, parol evidence is inadmissible to show that they considered a matter which furnished no legal basis for a claim for damages.<sup>3</sup> Such a defence, if it is to be relied upon on at

<sup>1</sup> *Sherron v. Wood*, 5 Halst. 7 (*per* Ewing, C. J.).

<sup>2</sup> *Duren v. Getchell*, 55 Maine, 241.

<sup>3</sup> *Rundell v. La Fleur*, 6 Allen, 480.



all, must be set up before the arbitrators. Thus, in an arbitration concerning a lottery prize, the illegality of the lottery must be urged before the arbitrators, and cannot be set up in an action on the award.<sup>1</sup>

**Pleading Performance of the Award.**—In an action of debt on the arbitration bond, for non-performance of the award, the defendant cannot plead generally that he has performed, but must set forth the award and show how he has performed it.<sup>2</sup>

Performance of every part of the award for which the defendant is liable must be shown. If he and others are ordered respectively to do separate acts, and he is liable for performance by the others, it is not enough for him to set up that he has done the specific act allotted to him.<sup>3</sup>

If an award order a party to pay the rent named in an indenture, the indenture need not be set forth at length. But if the order be to pay the rent according to the terms of the indenture, then it must be set out at length. And so, also, if the order be for the payment of a legacy.<sup>4</sup>

Parol evidence of events subsequent to the award, showing how far each party has performed or fallen short of the duties enjoined upon him, and also operating to render intelligible the otherwise obscure and uncertain bond and award, is admissible in an action of debt on the bond.<sup>5</sup>

**Pleading the Statute of Limitations.**—By the old common law, since changed in England by statute,<sup>6</sup> in an action of debt on an award executed under the hand and seal of the arbitrators, the defendant could not plead that the cause of action did not accrue within six years, since the Statute of Limitations certainly did not apply to awards thus executed, which were

<sup>1</sup> *Waite v. Barry*, 12 Wend. 377.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 531; *Anon.*, F. Moore, 3 pl. 9.

<sup>3</sup> *Russell, ubi supra*; *Genne v. Tinker*, 3 Lev. 24; *Veale v. Warner*, 1 Saund. 324 a., 1, 3.

<sup>4</sup> *Russell, ubi supra*; *Anon.*, 1 Vent. 87; *Hagh v. Chadwick*, 2 Keb. 667.

<sup>5</sup> *Galvin v. Thompson*, 13 Maine, 367.

<sup>6</sup> 3 & 4 Will. IV. c. 42, § 3.

said to be *quasi* specialties, and probably did not apply to any awards at all.<sup>1</sup>

It is no defence to a note given for a sum awarded against the maker, that the arbitrators allowed claims barred by the Statute of Limitations. The ruling in this case is not based on the fact that the arbitrators had a right to allow these demands, but on the principle that such allowance does not prove the note to be without consideration.<sup>2</sup>

**Pleading Revocation of the Submission.**—Revocation of the authority of the arbitrator before award made is a good answer, and may be pleaded by the defendant; excepting, in England, in those cases where the submission can be made a rule of court.<sup>3</sup>

Marriage of a *feme sole*, a party to the submission, pending the arbitration, may be pleaded as a revocation.<sup>4</sup>

**Pleading Foreign Attachment.**—A plea of a foreign attachment is good, provided such attachment was issued early enough, which must be before the penalty on the bond has been incurred. If it was not issued till the day after the award was made, it is too late, for the penalty was due when the money was not paid by the day.<sup>5</sup>

**Pleading an Oral Waiver.**—In an action on a bond of submission to arbitration, the defendant cannot plead an agreement not under seal to waive and abandon the award. His only remedy is by a cross action against the plaintiff for damage, for suing on the bond in breach of his agreement not to do so.<sup>6</sup>

But where the deed of submission was only inducement, and the action was upon the award, it was held that a subsequent

<sup>1</sup> Russell on Arb., 3d ed. p. 532; *Hodsden v. Harridge*, 2 Saund. 61 m; 2 Keb. 462.

<sup>2</sup> *Boynton v. Butterfield*, 6 Allen, 67.

<sup>3</sup> Russell on Arb., 3d ed. p. 532; *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

<sup>4</sup> *Charnley v. Winstanley*, 5 East, 266.

<sup>5</sup> Russell on Arb., 3d ed. pp. 532, 533; *Ingram v. Bernard*, 1 Ld. Raym. 636; see *Robbins v. Standard*, Sid. 327; *Coppell v. Smith*, 4 Term, 312.

<sup>6</sup> Russell on Arb., 3d ed. p. 533; *Braddick v. Thompson*, 8 East, 344.

alteration by parol, amounting to an accord and satisfaction, could be pleaded by the defendant.<sup>1</sup>

**Plea that Award was not ready in Time.** — Russell says that a plea that the award was not ready for delivery within the stipulated time, is said to be a good plea; though probably in most cases it would now be considered open to special demurrer as amounting to an argumentative plea of no award.<sup>2</sup>

If no time be limited for making the award, a plea that it was not made within a reasonable time is bad.<sup>3</sup>

**Plea that the cause of Action was not submitted.** — The defendant pleaded an award. The plaintiff replied that the matter constituting his cause of action was not included in the reference. He was allowed to show that this was the fact, although the submission was of all matters in difference, and this cause of action was in existence at the date of the submission.<sup>4</sup>

If an award, made pursuant to an oral submission, is pleaded in bar, the plaintiff is a competent witness to testify that the cause of action was not included in the submission entered into by him.<sup>5</sup>

**Defence in Suit on a Promissory Note.** — Where a note of a party is left with the arbitrators to be indorsed down to the sum which they shall find to be due, and then given to the gaining party, it seems that in an action on the note by the promisee, the same defences will be admissible which would be so in an action upon the original agreement of submission and award.<sup>6</sup>

**Demurrer in Suit on an Award.** — If the plaintiff set out an award bad on its face, as stated in the pleadings, the defendant should demur.<sup>7</sup>

<sup>1</sup> Russell, *ubi supra*; *Smith v. Trowsdale*, 3 El. & Bl. 83.

<sup>2</sup> Russell on Arb., 3d ed. pp. 529, 533.

<sup>3</sup> *Curtis v. Potts*, 3 Maule & Sel. 145.

<sup>4</sup> Russell on Arb., 3d ed. pp. 533, 534; *Ravee v. Farmer*, 4 Term, 146.

<sup>5</sup> *Cook v. Jaques*, 15 Gray, 59.

<sup>6</sup> *Page v. Pendergast*, 2 N. H. 233.

<sup>7</sup> Russell on Arb., 3d ed. p. 534; *Gisborne v. Hart*, 5 Mee. & W. 50; *Cargey v. Aitcheson*, 2 Barn. & Cress. 170; *Fisher v. Pimbley*, 11 East, 188.

Where the defendant expects to succeed by showing misconduct or partiality of the arbitrators, or fraud of the arbitrators or a party, he cannot demur to the plaintiff's declaration, though he thinks that the misconduct, partiality, or fraud can be discovered from the face of the papers by a careful examination thereof.<sup>1</sup>

Where the objection to the award is on the ground of its non-conformity with the submission, this is properly availed of in a suit on the award by a demurrer.<sup>2</sup>

**Execution of the Submission must be proved.** — The execution of the submission by all the parties to it, if traversed, must be proved by the party setting up and relying upon the award. The proof must be made in the usual manner; by the testimony of the attesting witness, if there be one; or if he be absent, his absence must be accounted for.<sup>3</sup>

A written and attested submission is not sufficiently proved by evidence of a rule making it a rule of court under a statute. Since the contract derives its force from the consent of the parties, and not from the rule, it must be proved like any other contract.<sup>4</sup> But a submission by a judge's order is properly evidenced by the rule of court; for the order is itself a judicial act, and by being made a rule is altered only in form, not in character; and the submission becomes a submission by rule of court, just as much as if it had originally been so without a judge's order.<sup>5</sup>

Where a submission is made by rule of court, the production of the rule of court and award, accompanied with proof of the execution of the latter instrument, constitutes *prima facie* evidence on behalf of the plaintiff in an action of *assumpsit* on the

<sup>1</sup> Duren v. Getchell, 55 Maine, 241; *ante*, p. 596. Wakeman v. Dalley, 44 Barb. 498, stated in Chap. XIX., *ante*, p. 541.

<sup>2</sup> Bean v. Farnam, 6 Pick. 269.

<sup>3</sup> Russell on Arb., 3d ed. p. 584; Ferrer v. Oven, 7 Barn. & Cress. 427; Brazier v. Jones, 8 id. 124; Antram v. Chace, 15 East, 208; Kingston v. Phelps, 1 Peake, N. P. 299; Spooner v. Payne, 4 C. B. 328; 16 L. J. C. P. 225.

Berney v. Read, 7 Q. B. 79.

<sup>5</sup> Ibid.; Still v. Halford, 4 Camp. 17; Russell on Arb., 3d ed. p. 584.

award, and sustains his declaration, unless the validity of the award be impeached by evidence *dehors* adduced by the defendant.<sup>1</sup>

**Proving the Existence and Contents of a Lost Submission.—**The averment and proof of the making of an agreement of submission and its contents, constitute necessarily the first step towards enforcing the award. The validity of the award is primarily and essentially dependent upon the undertaking of the parties. Ordinarily this will be easily proved by a production of the paper. But if no submission be produced, and there be no evidence of it, the mere fact of the existence of an instrument purporting to be an award, though ancient, will not be allowed to have any effect. The instrument will not be treated as having the force of an award.<sup>2</sup>

If, under a submission by counter bonds, the defendant withholds his, its contents may be proved by the one in the plaintiff's hands, supplemented by oral evidence.<sup>3</sup>

A submission was in the shape of a rule of reference entered into, according to statutory provisions, before a justice of the peace, and certified by him. Upon this the jurisdiction of the court was, of course, based. At the trial it was not forthcoming, but satisfactory proof of its loss was offered at the trial for the purpose of laying a basis for the introduction of proof of its contents, and of the fact that it was laid before the referees and acted upon by them. The court held that this evidence was admissible, remarking, however, as one consideration which favored the application of the doctrine of secondary evidence of the contents of lost papers to a case of this description, that "the paper was an official document, not in the custody of the party interested to preserve it safely, but officially in the custody of the arbitrators."<sup>4</sup>

<sup>1</sup> Russell, p. 535; *Gisborne v. Hart*, 5 Mee. & Wel. 50.

<sup>2</sup> *Burghardt v. Turner*, 12 Pick. 534.

<sup>3</sup> *Loring v. Whittemore*, 13 Gray, 228.

<sup>4</sup> *Eaton v. Hall*, 5 Metc. (Mass.) 287.

In a suit where the submission was ruled out, evidence that an arbitrator had presented the award to the defendant, who had thereupon promised to pay the amount, was admitted and treated as sufficient evidence of a submission to support the award.<sup>1</sup>

**Part Performance of Award is Evidence of Submission.** — If a party has in part conformed to an award by complying with any of its orders, such conduct upon his part is competent, and sometimes, at least, is sufficient, evidence of his having entered into the submission. Thus where an award directed the defendant to sign a memorandum, to the effect that he would not pirate the plaintiff's inventions, proof that the defendant had in fact signed such a memorandum as was called for by the award was held to constitute sufficient evidence of his having entered into the submission.<sup>2</sup>

**Statement of a Party as Evidence.** — The statement of a party that he has submitted to arbitration, and that the award has been rendered against him, is competent evidence against him as well of the submission as of the award.<sup>3</sup>

**Evidence of Fraud.** — According to the old rule in England, if the submission had been procured by fraud, the defendant might plead no submission, and then show in evidence the fraud, which would entitle him to treat it as no submission. Or he might plead no award, and sustain it by the same proof.<sup>4</sup> But it seems that he could not, under any plea, give evidence showing the award was made as it was in consequence of fraudulent conduct on the part of the parties interested.<sup>5</sup>

**Enforcing Specific Performance of an Award by Proceedings in Equity.** — The general principle concerning the enforcement, in

<sup>1</sup> *Williams v. Williams*, 11 Sm. & M. 393; and see *Green v. Ford*, 17 Ark. 586.

<sup>2</sup> *Stuart v. Nicholson*, 3 Bing. N. C. 113.

<sup>3</sup> *Murray v. Gregory*, 5 Exch. 486.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 542; *Sackett v. Owen*, 2 Chitty's Rep. 39.

<sup>5</sup> *Russell, ubi supra*; *Dyer v. Dawson*, cited in *Heming v. Swinerton*, 1 Coop. C. C. 420, notes.

equity, of specific performance of an award is very clearly laid down by Russell in the following language, upon which it would be difficult to improve: "A bill in equity," he says, "will lie to enforce specific performance of an award, when the thing ordered by the award to be done is such as a court of equity would specifically enforce, if it had been agreed upon by the parties themselves. For as by the submission the parties have contracted to do what the arbitrator shall direct, when the latter has made his decision, the award is considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and will be enforced against a party as the party's own agreement."<sup>1</sup>

But equity will not interfere to enforce specific performance where there is an adequate remedy at common law; as, for example, where the award simply directs the payment of a sum of money.<sup>2</sup>

The same principles prevail also in the United States, and it is the universally acknowledged law that courts of chancery have power to compel specific performance of awards, provided that no adequate remedy exists at law. Thus, if the award call for a conveyance of lands, a bill for specific performance will lie.<sup>3</sup> But if the award be only for the payment of a sum of money, or the delivery of chattels or the like, the relief at law, by suit upon the award, is ample, and equity will not

<sup>1</sup> Russell on Arb., 3d ed. p. 545; *Walters v. Morgan*, 2 Cox, 369; *Wood v. Griffith*, 1 Wils. C. C. 34; 1 Swanst. 43; *Gervais v. Edwards*, 2 Dru. & War. 80. See a careful discussion of the English cases by Chief Justice Parker, in which he arrives at the same conclusion as to the English doctrine in cases relating to the conveyance of real estate, in *Jones v. The Boston Mill Corporation*, 4 Pick. 507.

<sup>2</sup> Russell, *ubi supra*; *Walters v. Morgan*, 2 Cox, 369; *Hall v. Hardy*, 3 P. Wms. 187.

<sup>3</sup> *McNeil v. Magee*, 5 Mason, 244; *Jones v. Boston Mill Corporation*, 4 Pick. 507; *Page v. Foster*, 7 N. H. 392; *Penniman v. Rodman*, 13 Metc. (Mass.) 382; *Caldwell v. Dickinson*, 13 Gray, 365; *Smith v. Smith*, 4 Rand. 95; *Hodges v. Saunders*, 17 Pick. 470; *McNear v. Bailey*, 18 Maine, 251; *Bouck v. Wilber*, 4 Johns. 405 (in which case the court even corrected an obvious blunder in the award before entering the decree).

interfere.<sup>1</sup> The ground upon which this jurisdiction is entertained by courts of equity is said, by Judge Story, to be, that "it is but an execution of the agreement of the parties, ascertained and fixed by the arbitrators."<sup>2</sup> So, also, Chief Justice Parker, in *Jones v. Boston Mill Corporation*,<sup>3</sup> says that the subject, upon its "true footing," is "the specific performance of a contract in writing; for the submission is the agreement. It is virtually a contract to do what shall be awarded; and there does not seem to be any reason why it is not as much the subject of equity power, as if the contract were complete without the interference of an arbitrator."<sup>3</sup>

An arbitration bond in a controversy concerning a boundary line was conditioned that the parties should "give deeds according to the award of the referees." The losing party refused to do so, and the court held that the other party had not a plain, adequate, and complete remedy at the common law, for the breach of the condition; and that he was therefore entitled to maintain his bill in equity for specific performance.<sup>4</sup>

But the bill seeking specific performance is addressed to the discretion of the court. The rights of the respondent under the bill will be carefully guarded by a conditional decree, if such be necessary, or even by a direct order to the plaintiff to comply with the award upon his own part. And in proper cases the prayer of the bill will be altogether disallowed, where to grant it would be to work practical injustice; *e.g.*, where the complainant has been guilty of injurious delay, voluntary and unjustifiable upon his part, especially if during such delay circumstances have materially changed so that a decree of specific performance would place the defendant in a worse position than that in which the award would have

<sup>1</sup> *Jones v. Boston Mill Corporation*, 4 Pick. 507.

<sup>2</sup> *McNeil v. Magee*, 5 Mason, 244.

<sup>3</sup> 4 Pick. 507; so also in *Penniman v. Rodman*, 13 Metc. (Mass.) 382.

<sup>4</sup> *Caldwell v. Dickinson*, 13 Gray, 365.



placed him, or than he ought in justice and good conscience to occupy.<sup>1</sup>

The nature of the submission, whether *in pais*, by rule of court, or under a statute, is regarded in England as having no effect upon the right to seek specific performance by a bill in equity. If the fact that it is by rule or under a statute furnishes a means of summary enforcement by a process of the common law, as, for example, by execution or attachment, the two remedies are co-existent and collateral. If the award be intrinsically fit to be enforced specifically by a decree in equity, the bill will lie.<sup>2</sup>

If the award order the performance of a specific act, it will generally be within the scope of the jurisdiction of a court of equity to enforce specific performance. Especially will this be the case if the order concerns real estate, directing execution of a deed or release or other act whatsoever.<sup>3</sup>

**Acquiescence as a Preliminary to a Decree for Specific Performance.**—The old English rule, requiring acquiescence by the parties in the award, or performance of his part by one of them, as a necessary preliminary to entertaining a bill for specific performance,<sup>4</sup> has been long since done away with.<sup>5</sup> But if the award be such that to enforce specific performance by the one party, where there has been no performance, neither is any readiness to perform shown, would work injustice, a court of equity, being entitled to use its discretion in the matter, may refuse the prayer of the bill altogether, or enter only a conditional decree.<sup>6</sup>

<sup>1</sup> McNeil v. Magee, 5 Mason, 244.

<sup>2</sup> Russell on Arb., 3d ed. pp. 544, 545; Nickels v. Hancock, 7 De Gex, M. & G. 300; Wood v. Griffith, 1 Wils. C. C. 34; 1 Swanst. 43; Walters v. Morgan, 2 Cox, 369; Auriol v. Smith, 1 Turn. & Ry. 121; Hawksworth v. Brammall, 5 Mylne & C. 281.

<sup>3</sup> Russell, *ubi supra*; Walters v. Morgan, 2 Cox, 369; Hall v. Hardy, 3 P. Wms. 187; Henry v. Kirwan, 9 Ir. C. L. 459; The Regent's Canal Co. v. Ware, 26 L. J. Chy. 566; 23 Beav. 575; Mason v. The Stokes Bay Railway Company, 32 L. J. Chy. 110.

<sup>4</sup> See Bishop v. Bishop, 1 Rep. in Chy. 75, 141; Thompson v. Noel, 1 Atk. 60; Eyre v. Good, 2 Rep. in Chy. 18, 34; Bishop v. Webster, 1 Ca. in Eq. Ab. 51, pl. 9.

<sup>5</sup> Russell on Arb., 3d ed. p. 546.

<sup>6</sup> Per Story, J. in McNeil v. Magee, 5 Mason, 244, at pp. 256, 257.

So also it has been said in Massachusetts, in the case of a bill praying specific performance of a valid award ordering a conveyance of real estate, that the award was subject to the equity jurisdiction of the court "without any subsequent assent, express or implied."<sup>1</sup>

But ever since the days of Charles II. the courts have not hesitated to enforce specific performance where there has been performance either in part or in whole by the complainant in the bill.<sup>2</sup> And where there had been assent and part performance there is an instance where the court enforced specific performance even of an award not good in strictness of law.<sup>3</sup>

**A Penalty does not take the Place of Performance.** — If the agreement to abide by and perform the award be secured by a penalty, the court of equity will not compel the party to receive the penalty in lieu of performance, but will compel specific performance.<sup>4</sup>

**Right to Specific Performance as affected by Lapse of Time.** — It has been said that the right to enforce in equity the specific performance of an award is not lost or waived by mere lapse of time.<sup>5</sup> For example, in the case cited, twelve years had elapsed, and still performance was decreed. But it seems that this rule is to be construed sensibly, and that the party must seek to compel the performance within such time as the nature of the case will permit or render reasonable. Thus, it having been referred to arbitrators to settle the terms on which the

<sup>1</sup> *Jones v. The Boston Mill Corporation*, 4 Pick. 507; *per Parker, C. J.*, at p. 515.

<sup>2</sup> *Russell on Arb.*, 3d ed. p. 546; *Norton v. Mascall*, 2 Rep. in Chy. 304; *Poole v. Pipe*, 3 id. 11, 20; *Church v. Roper*, 1 id. 75, 141; *Hall v. Hardy*, 3 P. Wms. 187; but see *Nickels v. Hancock*, 7 De Gex, M. & G. 300, where some preliminary steps towards performance, which appeared to have misled nobody, were said not to constitute a sufficient basis for enforcing a specific performance.

<sup>3</sup> *Norton v. Mascall*, 2 Vern. 24; and see *Scott v. Wray*, 1 Rep. in Chy. 45, 85; *Ewes v. Blackwall*, Cas. Temp. Finch, 22.

<sup>4</sup> *Belchier v. Reynolds*, 2 Ld. Kenyon, Part II. 87. See also *Caldwell v. Dickinson*, 13 Gray, 365, stated *ante*, p. 604.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 548; *Sweet v. Hole*, Cas. Temp. Finch, 384; *Eads v. Williams*, 24 L. J. Chy. 531.

defendant should take the lease of a mine of which he had entered into occupation, they rendered their award in April. The defendant remained in possession till December, and then finally abandoned the mine. Three years and a half elapsed before the filing of the bill in equity for specific performance. Lord Cranworth held that this delay was a bar to the relief sought.<sup>1</sup>

**No Specific Performance of Illegal Matters.** — Any order embraced in the award of an illegal nature, or unauthorized by the form of the submission, cannot be enforced. For example, if an order be such that it could, under the Statute of Frauds, be based only on a written submission, it will not be enforced if the submission was oral;<sup>2</sup> neither will an order creating a perpetuity be enforced.<sup>3</sup>

**Enforcement of Unreasonable Orders.** — Russell says that “the court will not enforce an award, when the submission and award together constitute an unwise and unreasonable agreement, or one which is incapable of being worked out consistently with the terms of the submission; and it is very doubtful whether it will enforce part of an award when it cannot enforce the whole.”<sup>4</sup> What degree of discretion a court would feel itself authorized to exercise in determining what is “wise and reasonable” in an award is left in doubt. But unquestionably, by analogy and the whole spirit of the law in relation to awards, a great reluctance would be manifested to refuse enforcement upon this ground, and a very gross case of unreasonableness would be required to be clearly made out. Indeed, Russell himself, on a subsequent page, says that “though equity will not compel the specific per-

<sup>1</sup> *Eads v. Williams*, 24 L. J. Chy. 531.

<sup>2</sup> *Walters v. Morgan*, 2 Cox, 369.

<sup>3</sup> *Bishop v. Bishop*, 1 Rep. in Chy. 75, 141.

<sup>4</sup> Russell on Arb., 3d ed. p. 546; *Nickels v. Hancock*, 7 De Gex, M. & G. 300; *Cavendish v. —*, 1 Cas. in Chy. 279; 1 Eq. Ca. Abr. 50; *Evans v. Cogan*, 2 P. Wms. 450; but see *Bishop of Bath and Wells v. Hipposley*, cited in *Harvey v. Ashley*, 3 Atk. 607, also stated in Russell at p. 550; and see *McNeil v. Magee*, 5 Mason, 244, stated *ante*, p. 604, 605.

formance of an *agreement* it deems unreasonable, it will nevertheless enforce an *award*, although it may consider it unreasonable; for the parties give to the act of an arbitrator an authority which cannot be given to their own acts.”<sup>1</sup> This certainly seems a far more probable and sound enunciation of the law. Yet in some cases, where a strong case of injustice has been made out, a decree of specific performance has been refused.<sup>2</sup> Of course if the injustice take the form of a defect in the award, as if it arise out of or constitute a want of mutuality, specific performance would be refused, but on the ground of the invalidity, not the unreasonableness or injustice of the award.

**Enforcement of Specific Performance by and against Strangers.** — A stranger to a submission cannot have a decree for specific performance of the award.<sup>3</sup>

But where a stranger to the submission assents to the award,<sup>4</sup> or where, knowing of the pendency of the arbitration and having a claim likely to be affected by it, he lies by without presenting his claim,<sup>5</sup> he may sometimes put himself in such a position that a court of equity will decree specific performance against him.

**Demurrer to a Bill for Specific Performance.** — Demurrer will lie to a bill seeking specific performance of an award, if the award as set forth appears bad upon its face.<sup>6</sup> So also if there be an illegal direction in the award, demurrer will lie to so much of the bill as prays for the performance of that part of the award which is vitiated by this defect.<sup>7</sup>

**Sustaining an Award by Injunction.** — An award will some-

<sup>1</sup> Russell, p. 549; *Wood v. Griffith*, 1 Wils. 34; 1 Swanst. 43.

<sup>2</sup> *Emery v. Wase*, 5 Ves. Jr. 846, and on an appeal 8 id. 505; *Berry v. Wade*, Cas. Temp. Finch, 180.

<sup>3</sup> *Thompson v. Noel*, 1 Atk. 60.

<sup>4</sup> *Evans v. Cogan*, 2 P. Wms. 450.

<sup>5</sup> *Govett v. Richmond*, 7 Sim. 1.

<sup>6</sup> *Hopcraft v. Hickman*, 2 Sim. & St. 130.

<sup>7</sup> *Bishop v. Bishop*, 1 Rep. in Chy. 75.

times be enforced by an injunction, restraining a party from acting in contravention of it. For example, it was the duty of an arbitrator, among other things, to set out a road for a party from a certain bridge. After the award setting out the road had been made, the other party proposed to remove the bridge. The court, on the ground that such a proceeding would be in fraud of the reference, issued an injunction forbidding it to be done.<sup>1</sup>

An award gave damages for injury to a market-garden by neighboring gas-works. The evil was continued, and the court granted a perpetual injunction to restrain the gas company; and this, too, although the arbitrator had been authorized to say what should be done, and had given no directions.<sup>2</sup>

If a suit at law has been instituted, application may also, in a proper case (as, if there be fraud, partiality, misconduct, or mistake, or other objection not available in defence in the action), be made to a court of equity to enjoin further prosecution of the suit.<sup>3</sup>

**Pleading an Award in Bar to a Bill in Equity.**—An award may be pleaded in bar to a bill to set aside the award and open the account.<sup>4</sup>

A plea of an award is not only good to the merits of the case, but to the discovery sought by the bill. For a defendant is not obliged to set out the full account after an award has been made in respect of that very account, which award remains conclusive as to all parties until some error be shown in taking the account, or partiality or other misconduct on the part of the arbitrator.<sup>5</sup>

<sup>1</sup> *Wood v. The North Staffordshire Railway Company*, 13 Jur. 466.

<sup>2</sup> *Broadbent v. The Imperial Gas Company*, 7 De Gex, M. & G. 436; 26 L. J. Chy. 276; affirmed, 6 H. of L. Cas. 600; 29 L. J. Chy. 377.

<sup>3</sup> *Sisk v. Garey*, 27 Md. 401; *Cleland v. Hedly*, 5 R. I. 163.

<sup>4</sup> *Russell on Arb.*, 8d ed. p. 552; *Pusey v. Desbouvrie*, 3 P. Wms. 315, *per* Lord Talbot, Chanc.; *Farrington v. Chute*, 1 Vern. 72.

<sup>5</sup> *Russell, ubi supra*; *Tittenson v. Peat*, 3 Atk. 529.

But an answer supporting the plea should specifically deny the charges in the bill impeaching the award.<sup>1</sup>

If the bill to set aside the award alleges fraud, corruption, or mistake of the arbitrator or of a party, these allegations must be denied by averments in the plea, and by an answer in support of the plea. So every matter averred in the bill against the award must be denied in the same manner. Simply pleading the award is insufficient.<sup>2</sup>

Some doubt has been thrown by the Court of Exchequer upon the propriety of putting into the plea averments denying the matter charged in the bill.<sup>3</sup> But Lord Chancellor Eldon subsequently disapproved of the ruling in these cases, saying that it was not easy to support them, and that there was "hardly one point of equitable proceedings with regard to pleas, which it was not extremely difficult to reconcile to them."<sup>4</sup> Wherefore, says Russell, "it is apprehended that the doctrine previously laid down, as cited from Lord Redesdale, of the necessity of such averments, is the law at the present day."<sup>5</sup>

If the defendant swear that the accounts taken by the arbitrators are true accounts, but do not answer to particular matters of impeachment alleged in the bill, the court will overrule the plea.<sup>6</sup>

A bill to set aside an award charged collusion and want of notice to the plaintiff. The plea averred the arbitration, full notice to the plaintiff, presence of the plaintiff's agent, and a full discussion before the award was made; an answer further averred the fairness of the transaction. Lord Kenyon, M. R., held the plea good.<sup>7</sup>

<sup>1</sup> Russell, p. 555.

<sup>2</sup> Russell on Arb., p. 554; *Evans v. Harris*, 2 Ves. & B. 361, 364; *Butcher v. Cole*, cited in *Edmundson v. Hartley*, 1 Anst. 99; *Gartside v. Gartside*, 3 id. 735.

<sup>3</sup> *Pope v. Bish*, 1 Anst. 59; *Edmundson v. Hartley*, ib. 97.

<sup>4</sup> *Bayley v. Adams*, 6 Ves. Jr. 586, at p. 598.

<sup>5</sup> Russell on Arb., 3d ed. p. 555.

<sup>6</sup> *South Sea Company v. Bumstead*, 2 Eq. Ca. Abr. 80; 3 Vin. Abr. Arb. 140, pl. 39.

<sup>7</sup> *Butcher v. Cole*, cited in *Edmundson v. Hartley*, 1 Anst. 99.

A bill to set aside an award suggested fraud on the part of the arbitrator. The defendant pleaded the award, and insisted that it was fair. The answer was very loose, and the submission provided for amending errors of the arbitrators. The court directed the plea to stand for an answer, with liberty to except.<sup>1</sup>

So, again, a bill sought to open an account for fraud. The defendant pleaded an award and release, and his plea was ordered to stand for an answer, with liberty to except.<sup>2</sup>

The subject of pleading an award in bar, when made under an agreement entered into after the bill has been filed, has been already discussed.<sup>3</sup>

**Vacating an Award by Motion.** — It will often happen that a party to a submission is dissatisfied with an award, and wishes to have it affirmatively declared void by a competent authority, without waiting to avail himself of his objection to its validity in any suit which may at any time be brought upon it. In such case, if the award be brought within the jurisdiction of a court, either because it is made pursuant to a rule of court, or where it has been made under a statute which makes it returnable into court and it has actually been returned into court, the objecting party can usually avail himself of his objection either by advancing it in opposition to any motion of his opponent to have the award accepted, or by making it the ground of an independent and original motion upon his own part to have the award rejected or declared void. The rule at common law, which may, of course, be varied by statute, allows any matter which could be alleged by way of defence in a suit at law upon the award, to be made the basis of a motion to set it aside.

So, likewise, it has been held that when the parties have agreed in their written submission that judgment shall be en-

<sup>1</sup> *Kampshire v. Young*, 2 Atk. 154.

<sup>2</sup> *Burton v. Ellington*, 3 Bro. C. C. 196.

<sup>3</sup> *Ante*, Chapter XVIII.

tered on the award, the court may upon motion vacate the award, on the ground that the arbitrators exceeded their powers,<sup>1</sup> or imperfectly executed them, or made an award which was not mutual, or not final, or not definite.<sup>2</sup> At the hearing upon such a motion the court may go behind the submission and award, and admit testimony concerning the proceedings before the arbitrators.<sup>3</sup>

At common law the misconduct of the arbitrator, not being an available defence in a suit on the award, ought not properly to be made the ground of a motion, though in England it can now be thus availed of by virtue of the Statute 9 & 10 Will. III. c. 15, or of the Common Law Procedure Act of 1854.<sup>4</sup> And so also it was held in New Hampshire that an award, where the submission is made a rule of court, may be set aside on motion, upon the grounds of misconduct, corruption, or mistake on the part of the arbitrators.<sup>5</sup> And acceptance of a report of referees may be opposed for fraud or partiality, on the part of the referees.<sup>6</sup>

In the Supreme Court of New York, Chief Justice Savage said that the court had power to vacate an award, upon motion: "1. If procured by corruption, fraud, or other undue means; 2. If there was corruption in the arbitrators or either of them; 3. If the arbitrators were guilty of misconduct, in refusing to postpone the hearing for good cause, or in refusing proper evidence, or in other misbehavior affecting the rights

<sup>1</sup> *Adams v. Adams*, 8 N. H. 82; *In re Williams*, 4 Denio, 194, 2 R. S. 542, § 10; *Russell on Arb.*, 3d ed. p. 661; *Tandy v. Tandy*, 9 Dowl. 1044; *Boodlee v. Davies*, 3 Ad. & El. 200; *Price v. Popkin*, 10 id. 139; *Inhabitants of North Yarmouth v. Inhabitants of Cumberland*, 6 Greenl. 21.

<sup>2</sup> *In re Williams*, 4 Denio, 194; *Warfield v. Holbrook*, 20 Pick. 531; *Russell on Arb.*, 3d ed. p. 660; *In re Tribe & Upperton*, 3 Ad. & El. 295; *Martin v. Burge*, 4 Ad. & El. 973; *In re Marshall & Dresser*, 3 Q. B. 878; *Winter v. Munton*, 2 Moore, 723; *Samuel v. Cooper*, 2 Ad. & El. 752; *Rees v. Waters*, 16 Mee. & W. 263.

<sup>3</sup> *In re Williams*, 4 Denio, 194; *Butler v. Mayor, &c. of New York*, 7 Hill, 329 (Court of Errors).

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 642; *Veale v. Warner*, 1 Saund. 327 c, notes.

<sup>5</sup> *Elkins v. Page*, 45 N. H. 310; *Fletcher v. Hubbard*, 43 id. 58.

<sup>6</sup> *Inhabitants of North Yarmouth v. Inhabitants of Cumberland*, 6 Greenl. 21.



of either party ; 4. If the arbitrators exceeded their powers, or the award is not final.”<sup>1</sup>

Some English cases also hold that corruption or partiality of the arbitrator,<sup>2</sup> or his secret interest in the subject-matter of the arbitration,<sup>3</sup> constitute proper grounds for a motion to set aside his award.

So, also, if either party has fraudulently concealed any matter which he was bound to disclose, or has wilfully misled or deceived the arbitrator.<sup>4</sup>

In Maryland it was held in 1802 that “every ground of relief in equity against an award is equally open” in a court of law “upon motion in a summary way.”<sup>5</sup>

In Vermont it has been held that when the court has power to accept or reject a report of referees, any thing may be alleged against it which would be a good ground for relief against an award of arbitrators at law or in equity, or would be sufficient, according to the English practice, to set aside an award, when the submission is made a rule of court.<sup>6</sup>

But a report will not be vacated for matters curable by amendment.<sup>7</sup>

If the award be so altogether void that it must be considered to be a nullity, as, for example, if it has been made after the authority of the arbitrator has been revoked ; and if no advantage can be taken of it, except by means of a suit upon it, which, of course, must fail, the court will not usually interfere to set it aside.<sup>8</sup> But it is otherwise if the award can be availed of in any other manner than by suit upon it.<sup>9</sup>

<sup>1</sup> *Smith v. Cutler*, 10 Wend. 589.

<sup>2</sup> *Tittenson v. Peat*, 3 Atk. 529 ; *Morgan v. Mather*, 2 Ves. Jr. 15.

<sup>3</sup> *Earle v. Stocker*, 2 Vern. 251.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 662 ; *South Sea Company v. Bumstead*, 2 Eq. Cas. Abr. 80 ; *Mitchell v. Harris*, 2 Ves. Jr. 129 *a* ; *Metcalf v. Ives*, 1 Atk. 63 ; *Gartside v. Gartside*, 3 Anst. 735.

<sup>5</sup> *Goldsmith's Adm'r v. Tilly*, 1 Harris & J. 361.

<sup>6</sup> *Johns v. Stevens*, 3 Vt. 308.

<sup>7</sup> *Ladd v. Lord*, 36 Vt. 194.

<sup>8</sup> *Russell on Arb.*, 3d ed. p. 657.

<sup>9</sup> *Ibid.* ; *Doe d. Turnbull v. Brown*, 5 Barn. & Cress. 384 ; *Hobbs v. Ferrars*, 8 Dowl. 779 ; *Worrall v. Deane*, 2 id. 263.

It is said that the courts will not set aside an award on motion, unless it be clearly void upon the grounds alleged against it; because then it is at an end altogether. Whereas, if a suit be brought upon it, the question of validity may usually be more formally raised, and taken to a court of error.<sup>1</sup>

The motion must be made in open court. A judge at chambers is incompetent to entertain such a request. Though in vacation a judge may grant a stay of all proceedings under the award until the next term, in order to allow an opportunity for making the motion for avoidance in open court.<sup>2</sup>

**Discovery of New Matter as a Ground of a Motion to set aside an Award.**—“How far,” says Russell, “when there has been no fraud or concealment, the mere discovery of new material matter will be a ground for setting aside the award, does not seem clear.”<sup>3</sup>

In an Irish court of equity it has been said that the accidental omission to present a claim within the scope of the reference furnishes a fair case for relief in equity.<sup>4</sup> Upon the other hand it has been considered in England by the Court of Exchequer to be very doubtful whether the fact that the plaintiff was ignorant of a material part of his case until after the award had been made, would constitute a sufficient cause for letting in further inquiry.<sup>5</sup>

Lord Chancellor Hardwicke once said: “I will not say that in no case whatever new matter discovered after the award will affect it. But I do not know any case where it has been allowed. An award differs from a decree in this respect. A decree is compulsory; the parties cannot bring on their cause or delay it before the court. But an award is a judgment of judges of the parties’ own choosing, and they need not submit until fully approved of the merits of their case; and if they do,

<sup>1</sup> Russell on Arb., 3d ed. p. 681; *Cock v. Gent*, 13 Mee. & W. 364; *Stalworth v. Inns*, 13 id. 466.

<sup>2</sup> Russell on Arb., 3d ed. p. 642; *Cromer v. Churt*, 15 Mee. & W. 310.

<sup>3</sup> Russell on Arb., 3d ed. p. 662.

<sup>4</sup> *Brophy v. Holmes*, 2 Molloy, 1.

<sup>5</sup> *Gartside v. Gartside*, 3 Anst. 735.

it is their own fault. But justice in courts must be done in its course, and neither party can prevent it. It seems, therefore, of dangerous consequence to say that new matter discovered will affect an award, as it will do a decree upon a bill of review."<sup>1</sup>

In a case at common law it was said that the naked allegation of the discovery of new evidence after the making of the award was certainly not sufficient ground for a motion to set it aside. The affidavit should explicitly show what the new evidence is, that it could not have been previously obtained by reasonable diligence, and that there is some surprise.<sup>2</sup>

The setting up of an unexpected case by one's opponent, believed to be false, is no ground for setting aside an award on motion, unless application was made to the arbitrator at the hearing to give time for inquiry.<sup>3</sup>

Where the parties had been examined before the arbitrators by consent, after the award had been made one party discovered that his opponent was a convicted felon, and, therefore, incompetent to testify, and on this ground he moved the court to set aside the award. The court refused the motion, laying some stress, however, upon the fact that the arbitrator stated that his judgment was made up wholly independently of the testimony of the objectionable party.<sup>4</sup>

The allegation that a witness had wilfully given corrupt and false testimony before the arbitrator, was once refused to be treated as a sufficient basis for a motion to set aside the award. For, it was said, the witness might be proceeded against for perjury, and it would be setting a mischievous example to interfere at that time.<sup>5</sup>

It has been declared in Connecticut, in an old case, that the discovery of new evidence, or the fact that the case might be

<sup>1</sup> Russell, 3d ed. p. 663, citing *Ld. Montgomery v. Buckley*, Joddrell's MSS., cited in *Heming v. Swinnerton*, 1 Coop. C. C. 418.

<sup>2</sup> *Eardley v. Otley*, 2 Chitt. 42; *Reynolds v. Askew*, 5 Dowl. 682.

<sup>3</sup> *Solomon v. Solomon*, 28 L. J. Exch. 129.

<sup>4</sup> *Smith v. Sainsbury*, 9 Bing. 31.

<sup>5</sup> *Scales v. East London Water-works*, 1 Hodges, 91.

put on a different footing by new evidence, are no grounds for an application to a court of chancery to set aside an award.<sup>1</sup>

And in New York the court said that an award would not be set aside by reason of the discovery of new evidence, except in cases where the excuse for prior non-discovery is very strong indeed. The mere existence of an error in the award, as manifested by such new evidence, is not a sufficient ground.<sup>2</sup> In this instance the discovery was of a receipt, and the court refused to open the controversy afresh, "without something more than the mere simple allegation of a discovery and production of a receipt." The applicant rested on this assertion "without any proof of loss, search, or discovery, except what arose from the non-production of the paper before the arbitrators, and of its production" at this time.

Not only the alleged new facts, but also the evidence already presented, should be brought before the court on an application for a new trial, on the ground of newly discovered evidence. For the court must be enabled to see that the matter alleged to be new is really substantially so, and likewise that, if admitted, in connection with that before in the case, a different result would have been produced.<sup>3</sup>

**The Element of Time in Connection with New Evidence.**— Delay of four years, not satisfactorily accounted for, occurring after the discovery of new evidence and before application made to set aside an award on the ground of such discovery, is such *laches* that the application cannot be granted. The exact period within which the petition for relief should be preferred is said not to be "limited or defined by any positive rule of law; but it must certainly be done within a reasonable time." And the court, by analogy to certain statutory provisions in the matter of limitations, name the period of "one year after such discovery has been made" as a time

<sup>1</sup> *Allen v. Ranney*, 1 Conn. 569.

<sup>2</sup> *Todd v. Barlow*, 2 Johns. Ch. 551.

<sup>3</sup> *Brann v. Vassalboro'*, 50 Maine, 64.

within which the application based upon such discovery should be made. "This gives the petitioner ample time to make all requisite preparation for action on his part; and a fair regard for the rights of the adverse party requires that it should not be extended to any greater length."<sup>1</sup>

In the third term after an award had been made the plaintiff moved to set it aside, supporting the motion by the affidavit of a witness to the effect that he had sworn before the arbitrator that he had supplied certain goods to the defendant, whereas in fact, by an arrangement between them, he had not delivered the goods; also the plaintiff swore that he had only in this current term obtained knowledge of this fact. The court refused the application, partly by reason of the lapse of time, but partly also on the ground that the witness might have been cross-examined before the arbitrator, and that to allow such an affidavit to suffice to set aside an award, would be to open the door to innumerable frauds.<sup>2</sup>

Where the objection applied to a decision in respect of a claim of only £2 2s. the court refused a rule to set aside the award, on the ground that *de minimis non curat lex*.<sup>3</sup>

**Effect of vacating a Report in a *Lis pendens*.** — If a report of referees rendered in a pending cause is set aside by reason of some defect which affects its validity, and neither party asks for a recommitment, the cause will stand for trial in the court in which it is pending.<sup>4</sup>

When judgment on the report of a referee is reversed by the court, and no reasons are given, it will be presumed that the reversal was based on an error in a matter of law. His finding of facts will be assumed to be correct.<sup>5</sup>

**The English Rule as to setting aside an Award by Proceedings**

<sup>1</sup> *Inhabitants of Plymouth v. The Russell Mills*, 7 Allen, 438.

<sup>2</sup> *Pilmore v. Hood*, 8 Dowl. 21.

<sup>3</sup> *Brown v. Hellerby*, 1 Hurl. & Nor. 729; 26 L. J. Exch. 217.

<sup>4</sup> *James v. Thurston*, 1 Cliff. C. C. 367.

<sup>5</sup> *Marco v. Liverpool & London F. & L. Ins. Co.*, 35 N. Y. 664.

in Equity. — The English rule concerning the jurisdiction which will be assumed by a court of equity for the purpose of vacating an award is said by Russell to be that the court will entertain the bill equally whether the award be made pursuant to a submission *in pais*, or under a statute, or by rule of court. If the award be returnable into court, the remedy by bill in equity is collateral to the remedy by a motion to set aside, and is more extensive since it will lie for all causes whatsoever, whereas it has been already seen that a motion cannot always be availed of.<sup>1</sup>

Some of the cases in which relief may be had in equity, but cannot be otherwise obtained, may be here noted. The Court of Common Pleas, refusing to set aside or refer back an award or to alter the order of reference on the ground of a serious clerical mistake in copying an account forming part of the award, nevertheless suggested that relief might be had in equity.<sup>2</sup>

In an old case it was said that on a bill seeking to set aside an award and nothing more, a court of chancery would allow the complainant to go into no legal objections, save only partiality and corruption. But if the bill were for an account, and sought to set aside the award in order to let in the account, then it was open to the complainant to show legal objections.<sup>3</sup> Lord Chancellor Hardwicke says that when a bill is filed to set aside an award and for an account, since the plaintiff is entitled to an account unless the award be a bar, the court will enter into all the legal objections to the award which a court of law would entertain, it being insisted on by the plea to prevent a general account.<sup>4</sup>

A bill in equity was filed to set aside an award of an arbitrator in a matter of account, on the ground that he had re-

<sup>1</sup> Russell on Arb., 8d ed. pp. 689, 695, 696.

<sup>2</sup> Winn v. Nicholson, 7 C. B. 819.

<sup>3</sup> Champion v. Wenham, Amb. 245.

<sup>4</sup> Lingood v. Eade, 2 Atk. 501.

ceived in evidence and acted upon a certain account as an account stated, without sufficient evidence of its possessing that character, refusing to call for books containing prior transactions; and that he had refused to give credit for sums paid in those prior transactions and not included in the said account. Fraud in the other party and misconduct of the arbitrator were also alleged, but were not supported by proof. Lord Chancellor Cottenham held that the arbitrator had power to decide whether or not the account was an account stated, and that the plaintiff in equity had failed to prove the credits claimed. He also said that he disposed of the case on the facts, since in the existing state of the authorities as to the extent of the jurisdiction of chancery, disposing of it on the point of law would hardly be satisfactory. But, he added, "what is there to give a court of equity any peculiar jurisdiction in case of a judgment founded upon such an award, which it would not have had, if it had been founded upon a verdict?" "That failure at law from the errors of the judge or the jury, or in the conduct of the cause, will not *per se* give this court jurisdiction, is certain. Does a different rule prevail where the failure is attributable to any conduct in the arbitrator?"<sup>1</sup>

Though a bill will not lie to set aside an award on a question of fact determined by the arbitrators, yet evidence of the merits will be let in so far as it throws light on their conduct.<sup>2</sup>

The execution of mutual releases after the rendition of the award does not necessarily preclude inquiry into its validity.<sup>3</sup> But after the lapse of several years a party, who has received the sum awarded under a submission of all matters in difference and given a general release, will not be allowed to maintain a bill against the other party for a general account on the

<sup>1</sup> *Chuck v. Cremer*, 2 Phill. 477; 17 L. J. Chy. 287.

<sup>2</sup> *Goodman v. Sayers*, 2 Jac. & W. 249, 259; and see *Attorney-General v. Jackson*, 5 Hare, 355.

<sup>3</sup> *Morgan v. Pindar*, 3 Rep. in Chy. 76.

ground that only one specific matter was in fact disposed of by the arbitrators.<sup>1</sup>

A court of equity will sometimes refuse to interfere where the rule of a common-law court, under which an award is made, contains a clause empowering the court to refer the award back.<sup>2</sup>

**The American Rule as to setting aside an Award by Proceedings in Equity.** — It would appear that some, at least, of the courts in the United States are not inclined to adopt the English rule concerning the jurisdiction of courts of equity to set aside an award. It has been held that if the objections to the award are of such a character as to be open to the party seeking to avail of them by way of defence to an action at law upon the award, then a court of equity will not interfere.<sup>3</sup>

**Charges in the Bill.** — A bill to set aside an award ought to state fully both the ground on which the impeachment is based and all the circumstances thereof.<sup>4</sup>

**Demurrer to the Bill.** — If the bill impeaches the validity of the award upon grounds which the court cannot entertain, *e.g.* the erroneous judgment of the arbitrator, a demurrer to the bill is the proper mode of raising the question of the sufficiency of the objections.<sup>5</sup>

**Making an Arbitrator a Defendant.** — An arbitrator may be made a defendant to a bill to set aside an award, wherein his corruption or gross misconduct is charged; the object being to fasten upon him the payment of costs.<sup>6</sup>

<sup>1</sup> *Jones v. Bennett*, 1 Bro. P. C. 528.

<sup>2</sup> *Londonderry & Enniskillen Railway Company v. Leishman*, 12 Beav. 423.

<sup>3</sup> *Mickles v. Thayer*, 14 Allen, 114; *Ferson v. Drew*, 19 Wisc. 225; *Meloy v. Dougherty*, 16 id. 269.

<sup>4</sup> *Russell on Arb.*, 3d ed. p. 699; *Tittenson v. Peat*, 3 Atk. 529; *Routh v. Peach*, 2 Anst. 519; 3 id. 637.

<sup>5</sup> *Russell on Arb.*, 3d ed. p. 700; *Pitcher v. Rigby*, 9 Price, 79.

<sup>6</sup> *Russell on Arb.*, 3d ed. pp. 465, 466, 701; *Scott v. The Liverpool Corporation*, 25 L. J. Chy. 227; *Chicot v. Lequesne*, 2 Ves. Sr. 315; *Ward v. Periam*, cited in the last case; *Lord Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Steward v. East India Company*, 2 Vern. 380.



If an arbitrator be properly made a party, on a suggestion of his misbehavior, it is said by Lord Chancellor Northington to be a notorious fixed rule, that the plaintiff may read his answer against his co-defendant who is interested in the award and seeks to uphold it.<sup>1</sup>

<sup>1</sup> Russell, *ubi supra*, citing *Rybott v. Barrell*, 2 Eden, 131, 1 Coop. C. C. 383.

## CHAPTER XXIII.

### COSTS.

#### I. — ENGLISH CASES.

Different kinds of costs.

Power of the arbitrator where the submission is silent as to costs.

Power over costs expressly conferred by the submission.

Apportionment of costs by the arbitrator.

The arbitrator's action in respect of his own fees.

Stipulation that costs shall abide the event.

#### II. — THE AMERICAN CASES.

Distinction between different kinds of costs.

The power of arbitrators over the costs of the arbitration.

The power of arbitrators over the costs of suit.

An eccentric decision.

Omission to find costs in the award.

Stipulation that costs shall abide the event.

Form of an award of costs.

An award merely of costs.

#### I. — ENGLISH CASES.

**Different Kinds of Costs.**—It is matter of some difficulty, especially in the United States, to assert with accuracy what is the power of arbitrators in the matter of costs. This difficulty arises in part from inconsistent decisions, in part from laxity of phraseology in the language of the adjudications, often resulting in the confusion of certain distinctions which ought to be carefully preserved. In England the subject has been more philosophically treated, but even in England it is not wholly free from confusion. In that country the word costs includes three several classes of charges: to wit, costs of the cause; costs of the reference; costs of the award. The costs of the cause exist only where a *lis pendens* forms the whole or a part

of the subject-matter of the submission, or where the submission is made a rule of court. Russell says: "When an award, and not merely a certificate, is to be made, the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the cause, if any, after the award." Apparently also they include the costs of witnesses actually summoned for the trial, present and ready to testify, before the submission is made. Concerning costs of reference the same writer says: "Ordinarily the expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of the reference. They are taxed usually as between party and party. They include the costs of witnesses and the cost of a brief in the cause referred, prepared after the reference for the purposes of the arbitration." "The costs of the award are the amount of the arbitrator's charges, which are usually paid to him when the award is taken up."<sup>1</sup>

**Power of the Arbitrator where the Submission is silent as to Costs.**—Pursuing these distinctions, the English rule is that "When a cause alone or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate concerning the costs of the cause, but not of the reference or award;<sup>2</sup> and each party must bear his own expenses of the reference, and is liable to half the costs of the award."<sup>3</sup>

As a corollary to the foregoing we have the rule that, if the award be silent on the question of costs, the costs of *the cause*

<sup>1</sup> Russell on Arb., 3d ed. pp. 355-357.

<sup>2</sup> Ibid., citing *Firth v. Robinson*, 1 B. & C. 277; *Taylor v. Lady Gordon*, 9 Bing. 570; *Strutt v. Rogers*, 7 Taunt. 214; *Stratton v. Green*, 8 Bing. 437; *Candler v. Fuller*, Willes, 62; *Roe d. Wood v. Doe*, 2 Term, 644; *Bracher v. Cotton*, Barnes, 123; *Hartnell v. Hill*, Forrest, 73.

<sup>3</sup> Russell on Arb., 3d ed. p. 358, citing *Taylor v. Lady Gordon*, 9 Bing. 570; *Grove v. Cox*, 1 Taunt. 165; *Bell v. Benson*, 2 Chitty, 157.

follow the decision of *the cause*, even though other matters included in the submission be determined in favor of the party against whom the cause is decided.<sup>1</sup>

**Power over Costs expressly conferred by the Submission.**—“On reference of a cause and all matters in difference, if there be an express clause giving the arbitrator power over costs, and there appear nothing in the context to limit the generality of the power, the costs of the reference and award, as well as of the cause, seem to be submitted to his award.”<sup>2</sup>

It is said that he is not obliged, unless he please, to give any direction concerning the costs, although power to do so is expressly conferred. Yet silence as to costs is not always safe in such cases, for, says Russell, “in many cases it is probable that the courts may say the award is not final unless the arbitrator decides something respecting them.”<sup>3</sup>

In this connection the language of the submission must be carefully noted. If it be imperative in form, it will be positively incumbent upon the arbitrator to exercise the power which it confers upon him. Thus, if the submission specially stipulates that the arbitrator “*shall* ascertain” the costs, he must specify the amount in the award.<sup>4</sup> So also where it is provided that the costs shall be in the discretion of the arbitrator, and “shall be defrayed as he shall direct.”<sup>5</sup>

If the power be given to the arbitrator, “his discretion is subject to few limitations.”<sup>6</sup>

If the arbitrator has unlimited discretion to award concerning costs, he may name a gross sum to be paid by a party, and

<sup>1</sup> Russell on Arb., 3d ed. p. 360; *Young v. Gye*, 10 Moore, 198; *Mackintosh v. Blyth*, 1 Bing. 269.

<sup>2</sup> Russell on Arb., 3d ed. p. 359; citing *Strutt v. Rogers*, 7 Taunt. 214; *Wood v. O’Kelly*, 9 East, 436.

<sup>3</sup> Russell, pp. 360, 361.

<sup>4</sup> *Morgan v. Smith*, 1 Dowl. N. S. 617; 9 Mee. & W. 427; *Angus v. Redford*, 2 Dowl. N. S. 735; 11 Mee. & W. 69; *Grenfell v. Edgcome*, 7 Q. B. 661.

<sup>5</sup> *Richardson v. Worsley*, 5 Exch. 613.

<sup>6</sup> Russell, p. 361.

unless the amount be so excessive as to be evidence of partiality, it will not be interfered with by the court.<sup>1</sup>

He may generally direct the costs to be taxed by an officer of the court;<sup>2</sup> or may simply give costs without saying by whom they shall be taxed; in which case the regular officer will tax them.<sup>3</sup>

But if the costs are left to the discretion of the arbitrator, "*who shall ascertain the same*," he must determine the amount himself.<sup>4</sup>

**Apportionment of Costs by the Arbitrator.**—The arbitrator may apportion the costs between the parties as he shall see fit.<sup>5</sup>

If he has power over the costs of the cause and of the reference, he may direct that one of the parties shall bear the charge of preparing such legal instruments as may be required by the award to be executed.<sup>6</sup>

**The Arbitrator's Action in Respect of his own Fees.**—Russell states that it is the custom in England, and probably the same habit prevails universally in the United States, for the arbitrator to withhold his award until his own fees have been paid to him. Whether or not he ought to specify their amount, and embody orders concerning their payment in the award itself, seems to be a matter somewhat in dispute. Russell regards the practice as very reprehensible, but apparently as not wholly illegal.<sup>7</sup> He certainly cannot direct a certain specified sum to be paid into his hands, including in it an indefinite

<sup>1</sup> *Turner v. Rose*, 1 Ld. Kenyon, 393; *Shephard v. Brand*, Ca. Temp. Hardwicke, 53; 2 Barnard. 463; *Anon.*, 1 Chitty R. 38.

<sup>2</sup> *Pratt v. Salt*, Ca. Temp. Hardw. 161; *Winter v. Garlick*, 6 Mod. 195; 1 Salk. 75; *Pedley v. Goddard*, 7 Term, 73.

<sup>3</sup> *Browne v. Marsden*, 1 H. Bl. 223; *Stokes v. Lewis*, 2 Smith, 12; *Dudley v. Nettlefold*, 2 Stra. 737; *Thorpe v. Cole*, 4 Dowl. 457; *Stephenson v. Brown*, Barnes, 56.

<sup>4</sup> *Morgan v. Smith*, 1 Dowl. n. s. 617.

<sup>5</sup> *Cargey v. Aitcheson*, 2 Barn. & Cress. 170; *Young v. Bulman*, 13 C. B. 623.

<sup>6</sup> *Boyes v. Black*, 13 C. B. 652, 669.

<sup>7</sup> Russell on Arb., 3d ed. p. 634; *Seccombe v. Babb*, 6 Mee. & W. 129; *Daubuz v. Rickman*, 4 Dowl. 129; *Kendrick v. Davies*, 5 id. 693.

amount to be retained for himself.<sup>1</sup> The courts will not set aside or refer back an award because the arbitrator has stated in it his own fees, except upon an affidavit that the amount is excessive.<sup>2</sup> But if this portion of the award be objected to for excess or upon other good and sufficient reasons, it will, where the court has jurisdiction, be singled out and set aside. For it is said that the arbitrator ought not to be a judge in his own cause, and should not make an order naming any definite sum for his fees to constitute a part of his award.<sup>3</sup> How far the courts will go towards enforcing by attachment an order of this nature is left in some doubt. In one case the attachment was granted ;<sup>4</sup> but a later case took a contrary ground.<sup>5</sup>

**Stipulation that Costs shall abide the Event.**— It is the English rule that if the submission provides that the “costs” are to abide the event of the award, the subject of costs is taken entirely out of the control of the arbitrator, and the costs both of the reference and the award will follow the event of the award.<sup>6</sup>

## II. — THE AMERICAN CASES.

**Distinction between Different Kinds of Costs.**— The adjudications of the courts of the United States can hardly be said to have given to the rules concerning costs any very great degree of clearness or consistency. A distinction is generally taken between the costs of the reference or arbitration and the costs

<sup>1</sup> *Robinson v. Henderson*, 6 M. & S. 276.

<sup>2</sup> *Rose v. Redfern*, 10 W. R. 91.

<sup>3</sup> *Russell on Arb.*, 3d ed. p. 365 ; *George v. Lousley*, 8 East, 12 ; *Miller v. Robe*, 3 Taunt. 461 ; *Fitzgerald v. Graves*, 5 id. 341 ; *Barrett v. Parry*, 4 id. 657 ; *Brazier v. Bryant*, 2 Dowl. 600 ; *Moore v. Darley*, 1 C. B. 445 ; *In re Coombs*, 4 Exch. 889.

<sup>4</sup> *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334 ; see *Fernley v. Branson*, 20 L. J. Q. B. 178.

<sup>5</sup> *Parkinson v. Smith*, 30 L. J. Q. B. 178.

<sup>6</sup> *Russell on Arb.*, 3d ed. p. 368 *et seq.* ; *Wood v. O’Kelly*, 9 East, 436 ; *Kendrick v. Davies*, 5 Dowl. 693 ; *Hemsworth v. Brian*, 1 C. B. 131 ; *Unsted v. Kidd*, 1 Chitty R. 526 ; *Cockburn v. Newton*, 9 Dowl. 676 ; *Clarke v. Owen*, 2 Hurl. & Nor. 324.

of a pending cause submitted or referred. But further than this it has not generally been thought worth while to draw lines of separation.<sup>1</sup> But greater difficulty is experienced by reason of the inconsistency of the decisions of the various tribunals than by reason of any failure to establish nice distinctions.

**The Power of Arbitrators over the Costs of the Arbitration.**—Chief Justice Shaw, in 1847, laid it down as “judicially settled in this Commonwealth that without special authority arbitrators under an agreement *in pais*, where no cause is pending, have no power to award costs of arbitration.”<sup>2</sup>

But it has been held in Massachusetts that under a statutory submission of all demands, entered into before a justice, the arbitrators may order the losing party to pay the costs of court and of the arbitration.<sup>3</sup>

The decisions of some other States are to the same effect, denying to arbitrators any power over costs.<sup>4</sup> Though it should be borne in mind that if they exceed their authority by inserting orders respecting costs, such orders may probably be separable, leaving the rest of the award good.<sup>5</sup>

But a considerable number of authorities take the opposite ground; and hold that the power to award the costs of the arbitration is incident to the authority of the arbitrators, and that it is not essential to its existence that it should be conferred in terms by the submission.<sup>6</sup> In older cases, as it has

<sup>1</sup> *Vose v. How*, 13 Metc. (Mass.) 243.

<sup>2</sup> *Vose v. How*, 13 Metc. 243. To the same effect are the following Massachusetts cases: *Maynard v. Frederick*, 7 Cush. 247; *Shirley v. Shattuck*, 4 id. 470; *Peters v. Pierce*, 8 Mass. 398; *Harrington v. Brown*, 9 Allen, 579.

<sup>3</sup> *Harden v. Harden*, 11 Gray, 435; and see *Jones v. Carter*, 8 Allen, 431.

<sup>4</sup> *Gordon v. Tucker*, 6 Greenl. 247; *Walker v. Merrill*, 13 Maine, 173; *Day v. Hooper*, 51 id. 178; *Hanson v. Webber*, 40 id. 194; *Porter v. Buckfield Branch Railroad*, 32 id. 539; *Dundon v. Starin*, 19 Wisc. 261.

<sup>5</sup> *Porter v. Buckfield Branch Railroad*, 32 Maine, 539.

<sup>6</sup> *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125; *Cox v. Jagger*, 2 Cow. 383; *Chase v. Strain*, 15 N. H. 535; *Joy v. Simpson*, 2 N. H. 179; *Spof-*

been explained, the rule was held to be otherwise, on the ground that the costs were a matter arising subsequent to the submission, and so were not included in it, unless otherwise expressed. But the theory and the rule are said to be now alike abandoned.<sup>1</sup>

In *Hawley v. Hodges*, it was said to be an unquestionable incident to the arbitrator's authority to award concerning the costs of arbitration, though the submission was silent upon the subject.<sup>2</sup>

Judge Redfield says that the power to award costs, and especially the costs of the arbitrator, is "quite too important a power to be implied as a mere incident of the submission."<sup>3</sup>

**The Power of the Arbitrator over the Costs of Suit.** — If a submission or reference be entered into, in or of a pending cause, there seems to be no doubt that the arbitrator or referee has power to award concerning the costs of the suit, whatever may be thought concerning his power to award as to the costs of the arbitration or reference.<sup>4</sup> He may even order the party in whose favor he determines the controversy to bear the costs; for this may sometimes be equitable, and is within his discretion.<sup>5</sup>

So in an action of ejectment an award finding for the plaintiff with costs, but without damages, is good.<sup>6</sup>

*ford v. Spofford*, 10 id. 254; *Chapin v. Boody*, 25 id. 285; *Brown v. Mathes*, 5 id. 229; *Andrews v. Foster*, 42 id. 376. The rule may obviously be regarded as well established in New York and New Hampshire. So also it has been held in an old case in Connecticut; *Alling v. Munson*, 2 Conn. 691.

<sup>1</sup> *Strang v. Ferguson*, 14 Johns. 161.

<sup>2</sup> *Hawley v. Hodges*, 7 Vt. 237, cited and followed in *Bowman v. Downer*, 28 Vt. 532.

<sup>3</sup> *Morrison v. Buchanan*, 32 Vt. 288.

<sup>4</sup> *Vose v. How*, 13 Metc. (Mass.) 243; *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Crandon*, 15 Pick. 79; *Brown v. Mathes*, 5 N. H. 229; *Joy v. Simpson*, 2 id. 79; *School District v. Aldrich*, 13 id. 140; *Chapin v. Boody*, 25 id. 285.

<sup>5</sup> *Bacon v. Crandon*, 15 Pick. 79.

<sup>6</sup> *Austin v. Snow's Lessee*, 2 Dall. 157.



In a Massachusetts case, Bigelow, C. J., delivering the opinion, goes into the matter more at length, substantially as follows:—

Arbitrators under rule of court can award the “necessary costs of the cause,” such as their own fees, charges for the place of meeting, and cost of stationery and the like, and such as are “expressly authorized by law to be taxed as legal costs,” including herein fees for attendance of witnesses before the arbitrators, and other similar charges. But they cannot award to either party costs in the way of attorneys’ fees or other items of charge not expressly authorized by law.<sup>1</sup> It may be observed that many charges which would seem to be more properly described, at least according to the nicety of the English distinction, as costs of reference than as costs of the cause are included in the foregoing enumeration, and satisfactory clearness and consistency seems still to be as far off as ever.

**An Eccentric Decision.**—In *Chase v. Strain*, in New Hampshire, submission in a pending suit was made, concerning the “value of the work, . . . the subject of a suit now pending,” &c. The court held that the arbitrators had incidental power to award the *costs of the arbitration*, but had not power to award the costs of suit, since these were “a substantial and distinct matter, in no way involved in the question of the value of the work done.”<sup>2</sup> This decision, despite the apparent nicety of its distinctions, is certainly contrary to what must be regarded as the current of authority as regards one at least of the two points concerning costs upon which it adjudicates.

**Omission to find Costs in the Award.**—In New Hampshire, as it is held to be within the power, so also it is held to be therefore within the duty of the arbitrator to award costs; and if he has not done so in specific terms, it is nevertheless presumed that he considered them in coming to his determination and making up his award. Wherefore though the award be silent

<sup>1</sup> *Jones v. Carter*, 8 Allen, 431; and see *Harden v. Harden*, 11 Gray, 435.

<sup>2</sup> *Chase v. Strain*, 15 N. H. 535.

on the subject of costs, yet they will not be allowed to the winning party.<sup>1</sup>

Even if it be the duty of the arbitrators to tax the costs, and they neglect to do so, yet this will not necessarily avoid the award. If the party entitled to receive the costs consents to waive his claim to them, the remainder of the award may stand good.<sup>2</sup>

If a pending cause is the subject-matter of a reference, and the award is silent on the subject of costs, it has been held in Pennsylvania that they will be given to the successful party, by the court, in confirming the award, as being consequential thereupon.<sup>3</sup>

A pending cause was referred to arbitrators under a rule of court. They returned an award in which they made no mention of the subject of costs. The court held that the successful party was entitled to recover the taxable costs of the action and reference. For the costs of the suit were incidents of the action, and not separate and independent grounds of claim. It was to be inferred from the fact of silence that the referees gave their attention only to the merits of the claim in controversy; and it would not be a necessary or logical interpretation, after they had found in favor of the plaintiff, to say that he should bear the expenses of the litigation.<sup>4</sup>

An omission to state in the report or award the amount of the costs of the reference or arbitration is not a sufficient ground for rejecting the report or award at the request of the losing party.<sup>5</sup>

**Stipulation that Costs shall abide the Event.** — Two persons had brought divers actions against each other, all which they finally submitted to arbitration, providing that "costs shall be awarded to the parties who may succeed in said action, meaning to include

<sup>1</sup> Chapin v. Boody, 25 N. H. 285; Brown v. Mathes, 5 id. 229.

<sup>2</sup> Rixford v. Nye, 20 Vt. 132.

<sup>3</sup> Harvey v. Snow, 1 Yeates, 156.

<sup>4</sup> Woolson v. Boston & Worcester Railroad Corporation, 103 Mass. 580.

<sup>5</sup> Billington v. Sprague, 22 Maine, 34.

all manner of action and actions, cause or causes of action," &c. *Held*, that since some actions were found in favor of one party, and other actions in favor of the other party, the costs as well as the fees of the arbitrators must be divided between the parties by apportioning to each suit the amount properly to be borne by it.<sup>1</sup>

**Form of an Award of Costs.** — Authority given to the arbitrators to "award as to costs," enables them to decree that one party shall pay to the other a gross sum as costs. The items need not be given.<sup>2</sup>

If there be a suit pending, the award of costs, without naming any sum, will be good. It is not uncertain, since they may be taxed in the regular manner.<sup>3</sup> If there be no suit pending, a simple award of "costs" would be bad for uncertainty ; but an award of a specific sum by way of costs, or by reference to a schedule prepared by the arbitrators, is not open to the same objection, and is good.<sup>4</sup>

An uncertainty in the award upon the subject of costs will sometimes be curable, as in the following case, by the aid of an obvious presumption. A rule of reference was entered into between A. and D., — D. being administrator of the estates of B. and C., deceased, copartners, of whom C. was survivor. A.'s demand was against the partnership. The award was for payment from the estate of C., and that D. should pay the costs of reference. D. had three different funds in his hands. It was held that since the award did not say from which fund the costs should be paid, they must follow the damages awarded. These were expressly reported to be a charge on the partnership fund, and the costs should accordingly be paid from the same.<sup>5</sup>

<sup>1</sup> *Morrison v. Buchanan*, 32 Vt. 288.

<sup>2</sup> *Tallman v. Tallman*, 5 Cush. 325 ; *Thoreau v. Pallies*, 5 Allen, 354.

<sup>3</sup> *Hewitt v. Furman*, 16 Serg. & R. 135.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Whitney v. Cook*, 5 Mass. 139.

**An Award merely of Costs.** — The legal implication from an award, merely directing the payment of costs, without specifically disposing of the matter in controversy, has been already considered.<sup>1</sup>

<sup>1</sup> *Ante*, pp. 418 *et seq.* To the cases cited in notes 3 & 4 on p. 418, may be added, as illustrative of the same doctrine, the case of *Sears v. Vincent*, 8 Allen, 507.

# I N D E X.

---

**ABATEMENT.** See PLEADING; PRACTICE.

**ADJOURNMENT,**

- within arbitrator's discretion, 147.
- beyond time limited for award, 147.
- statutory provisions concerning, 148.
- applications for, in a cause before a referee, 148.
- death of witness during an, 149.
- record of, 150.
- by reason of surprise of party, 150.
  - absence of witness, 150.
- for procuring further testimony, 151.
- unreasonable refusal to grant, 151, 536.
- in absence of some of the arbitrators or referees, 151.

**ADMISSIONS,**

- by party, effect of, 128.

**AGENT,**

- formality of instrument creating, 10.
- general, cannot submit, 11.
- to collect, cannot submit, 11.
- to "settle," cannot submit, 11.
- to sue for sums due, cannot submit, 11.
- to compromise, can sometimes, not always, submit, 11, 12.
- to sue for and compound, can submit, 12.
- to underwrite and settle losses, can submit, 12.
- to prosecute or defend a suit, can submit, 12.
- with power of substitution, can submit, 13.
- submission by unauthorized, may be ratified, 13.
  - (See RATIFICATION.)
- submission by unauthorized, invalidates award, 380.
- may bind himself personally, 14, 32, 380, 381.
- instances of agent binding himself personally, 14, 15.
- to submit, cannot ratify award, 15, 532.
- duly authorized, may ratify award, 532.
- may consent to irregularities in proceedings, 15.
- arbitrator is, of both parties, 106.

(See ARBITRATOR.)

**AGENT**, — *continued*.

power of, to revoke submission, 238.

may request performance, 553.

**AGREEMENT**,

to submit, no bar to suit, 79, 90.

no specific performance of, 89, 90, 91.

penalty for breaking, 90.

damages for breaking, 95, 96.

effect of, when embodied in other contracts, 91 *et seq.*

when proceedings are begun, 91.

as condition precedent to right of action, 93 *et seq.*

in pleading, 95.

to party interested, is void, 95.

for entry of judgment on award, 80.

to abide by award, 87.

**ALTERATION**,

of submission, see **SUBMISSION**.

power of arbitrator to make, in award, see **ARBITRATOR**.

cannot be made by court to correct error, 330, 333, and see 328.

upon recommitment, see **RECOMMITMENT**.

**AMENDMENTS**,

power of arbitrator to allow, 207, 208.

cannot effect introduction of new substantive matter or cause of action, 208, 209.

what, may be allowed to defendant, 209.

motions for, are addressed to arbitrator's discretion, 210.

practice in allowing, 210.

of award, see **AWARD**; **MISTAKE**; **RECOMMITMENT**.

**APPEAL**,

effect of stipulating for no, 19, 86, 87.

**APPRAISALS**,

how far, are operative as award, 39 *et seq.*

**ARBITRATION**,

pendency of, at time of suit brought does not divest court of its jurisdiction, 79.

pendency of, must be availed of by plea in abatement, 79.

losing power to avail of, 79.

by arbitrators' refusal to act, 80.

ancient prejudice against, 437.

is now favored, 437.

**ARBITRATOR**,

who may be, 99.

person interested in result cannot be, 100, 104.

a debtor or creditor of a party may often be, 100.

a relation of a party cannot be, 101.

person having preconceived opinion cannot be, 101, 102, 108.

but objectionable person may be, by consent of parties, 102.

ARBITRATOR, — *continued.*

- objection to, must be taken promptly, 104, 105.
- a party may be also an, 105.
- judge may be, 105, 106.
- are agents of both parties, 106.
- must be impartial agent of both, 106 *et seq.*
- expression of opinion by, 108.
- commissioners, and other officials, acting as, 109.
  - such are sometimes amenable to the court, 109.
- absence of, 110.
- swearing, 110.

## (See OATH.)

- controls conduct of the proceedings, 115.
- must name time and place of hearing, 116.
- may revoke appointment of such time and place, 120.
- power of, to proceed *ex parte*, on non-attendance of party, 121 *et seq.*
- power of, to procure explanation from party, 125, 128.
  - to take evidence of sick person, 127.
  - to interrogate a party, 127.
  - to inquire abroad, 127.
  - to consider private admissions of party, 128.
  - to exclude party from hearings, 128.
  - to call in experts, 168, 169.
  - to call in counsel, 131.
  - to consult counsel, 170.
  - to employ counsel to frame award, 170, 275.
    - but not counsel of party, 275.
  - to swear witnesses, 131.

## (See OATH.)

- to summon witnesses, 134.
- to protect witnesses, 134.
- in respect of admitting evidence, 134 *et seq.*
  - result of error in the admission or rejection, 135 *et seq.*

## (See EVIDENCE.)

- to refuse to hear evidence, 142 *et seq.*, 536.
- to limit number of witnesses, 144.
- to re-open case, 145.
- to admit evidence *de bene esse*, 146, 147.
- in respect of adjournments, see ADJOURNMENT.
- to refuse to hear counsel, 130, 131.
- cannot receive *ex parte* communications, 534, 535.
- may hear statement when asked to act, 535.
- all must act together during proceedings, 151 *et seq.*
- so also if third arbitrator is called in, 158, 159.
- whether all need meet to execute award, 153, 154.

ARBITRATOR, — *continued*.

- all must unite in award, 162, 163.
- majority may be authorized to award, 162.
- such authority may be inferred, 163.
- cannot dissent from award after executing it, 164.
- all need not agree on each question, 164.
- process of coming to agreement by, 165.
- must exercise a judicial discretion, 165, 167.
- cannot adopt a mean sum, 166.
- cannot delegate authority, 166.
  - (See AWARD, under division concerning *finality*.)
  - nor accept opinion of another, 167.
  - but may rely on opinion of another, 167, 168.
  - can delegate performance of ministerial matters, 169.
- waiver of irregularities in proceedings before, 171.
  - (See WAIVER.)
- misconduct of, see MISCONDUCT.
- fraud or corruption of, see FRAUD.
- source and extent of authority of, 117.
- excess of authority by, 178.
  - does not always avoid award, 178.
  - presumption is against an excess, 179.
  - effect of, practice, &c. See EXCESS.
- cannot bind a man's liberty, 180.
  - or his right to real property, 180.
- power to award chattels, 180.
  - order marriage, 181.
    - a criminal or illegal act, 181.
- cannot exceed the submission in order to do equity, 181, 183, 184.
  - depart from or modify the submission, 182.
- may name time and place of payment, 184.
  - direct manner of payment, 185.
  - allow interest, 185.
- power in disputes between partners, 186 *et seq.*
  - to order dissolution, 186.
  - to arrange terms of dissolution, 187 *et seq.*
  - should find amounts due, 189.
  - has no power over creditors, 189.
  - duty to take accounts of credits and debits, 189, 190.
  - division of assets by, 190, 191.
  - cannot appoint receiver, 192.
  - personal liability of, 193.
- power of, to order execution of release, 192, 193.
  - to order conveyance of real estate, 193 *et seq.*
    - (See CONVEYANCE.)
  - in cases of land damages, 196.



ARBITRATOR, — *continued.*

- power of, to go behind receipt in full, 196, 197.
  - to give reasonable incidental orders, 197.
    - orders as to future action of parties, 198, 199.
- power of, to give orders as to future action of parties is to be sought in submission, 198, 199.
- power of, to give orders as to future action of parties may be inferred, 200.
- orders of, as to future action of parties, when valid, are absolutely conclusive, 201.
- power of, to give orders as to future action of parties will be sustained, if possible, 201.
- limitation of power of, in respect of past matters, 202.
- has no authority in respect of strangers to the submission, 202.
  - (See STRANGER.)
- power of, in reference of cross-actions, 205.
  - (See TESTIMONY.)
- has no power to name substitute, 205.
  - unless specially conferred, 206.
- in *lis pendens* may award more than *ad damnum*, 206.
- power of, to allow amendments in submission of *lis pendens*, 207 *et seq.*
  - (See AMENDMENT.)
- to admit claim in offset, 207.
- decision of, is conclusive both in law and fact, 293–296.
- under general submission, is final judge of law and fact, 296, 297.
- for whole matter as to conclusiveness of decision of, see MISTAKE.
- no difference between professional and non-professional, 315.
- an expert chosen as, 143, 144.
- testimony of, to show mistake, see MISTAKE.
  - to show award not co-extensive with submission, 361.
- is final judge of law and fact, 214.
- by what principles, should seek to be governed, 215–220.
- may disregard strict legal principles, 217 *et seq.*
- equitable powers of, 218, 219.
- may consider defences inadmissible in court of law, 221.
- may find facts and leave law to court, 220, 221.
- may reform erroneous instrument, 221.
- may disregard rules of practice, 222.
- authority of, ceases at time limited, 223.
  - exception to this rule, 223.
    - may be extended by agreement or act of parties, 224.
      - court, 224.
      - exhausted by making award or report, 226 *et seq.*
      - not revived, if award be vacated, 228.
- power of, to explain or alter report or award, 227 *et seq.*
  - to explain or alter by letters, 564.

**ARBITRATOR**, — *continued*.

power of, to alter, &c., by agreement of parties, 564.

allowed to correct a miscalculation, 228.

cannot be required to state grounds of decision, 569.

(See **TESTIMONY**.)

must testify as to facts occurring during proceedings, 570, 571.

cannot refuse to deliver award, 228.

revocation of authority of, see **REVOCATION**.

withdrawal, or refusal to act, 154 *et seq*.

revokes submission, 236.

must be distinct and final, 157.

need not be formal, 157.

by act, 158.

before proceedings are begun, 159.

after recommitment, 159, 160.

difference between third, and umpire, 241.

character and duty of third, 241, 242.

as defendant in bill to set aside award, 620, 621.

fees of, see **FEEES**.

**ASSIGNEES IN BANKRUPTCY**,

power of, to submit, 30.

whether submission by, admits assets, 30.

**ASSIGNMENT**,

to stranger of rights under award, 523, 524.

**ASSUMPSIT**,

will lie for costs, 578.

upon an award, 578, 579.

based on implied promise in award, 579.

for an instalment, 579.

against joint promisors to perform, 579.

executors of party, 579.

defences in, 579, 580.

maintainable by assignee, in name of party, 580.

in his own name, 580.

averments in action of, 586.

**AWARD**,*Miscellaneous.*

as to real estate of religious corporation, 4.

whether, will be enforced in equity against infant, 4.

execution of, may render it conclusive on a partner not bound by it, 9.

may be against one of two partners, being together the party of the one part, 9.

effect of, following submission by executor, &c., 19, 20.

how far measurements and estimates are operative as, 38, 39.

how far appraisals are operative as, 39 *et seq*.

a finding of damages under stipulation of a bond is, 42.

AWARD, — *continued.*

- a finding of costs under a confession of judgment is, 42.
- oral, as to boundary line, 51, 258.
- agreement for entry of judgment on, 80 *et seq.*
- suit upon, after alteration of submission, 85.
- agreement to abide by, 87.
- need not recite that all arbitrators acted together, 161.
  - unless required by statute, 162.
- all arbitrators must unite in, 162.
- by majority, 162, 163.
- process of determining upon, 165, 266.
  - need not be set forth, 433.
- waiver of stipulations as to form of, 174.
- performance of, effects waiver of all precedent defects, 174, 175.
- in part non-enforceable, 204.
- effect of performance of non-enforceable part of, 205.
- alteration of, by arbitrator, see ARBITRATOR; TESTIMONY.
- correction of one of two duplicates, 227.
- vacating, does not revive arbitrator's authority, 228.
- delivery of, cannot be refused, 228.
- annulling, by revocation, 231.
- no especial form of, 251, 252.
- need only contain decision, 252, 266.
- need not declare decision in set terms, 253.
- may contain it by implication, 253.
- oral, validity of, 256.
- stipulations for a written, 257.
- disposing of real estate must be in writing, 257.
- concerning boundary-lines may be oral, 51, 258.
- need not be attested, unless required by submission, 259, 262.
- nor under seal, unless required by submission, 259, 261.
- must conform to formalities required by the submission, 259 *et seq.*
- under hand of arbitrators, 260, 261.
- must be made within time named, 261.
- conditions precedent to validity of, 263.
- under statute, must comply with statute, 263.
  - but otherwise may sometimes be upheld, 264.
  - power of parties to waive strict compliance, 264.
- may be only of a sum in gross, 265.
- or may be of each item, separately, 265.
- need not always order release, 267.
- when need order discontinuance, 267, 268, 269.
- effect of, ordering a nonsuit, 269.
- by aid of promissory notes of parties, 269 *et seq.*

(See NOTE.)

AWARD, — *continued*.

if stipulated to be in form of note, is invalid in any other form, 274.

may be drafted by aid of counsel, 170, 275.

but not by aid of counsel of a party, 275.

need not recite submission or proceedings, 275-277.

nor extension of time, 276.

nor performance of condition precedent, 277.

inaccurate recital in, is generally immaterial, 277, 278.

possession of, as evidence, 289.

wrongfully obtained, 289, 290.

after performance, 561.

neither party bound to notify, to other, 290.

conclusiveness of and mistake in, for this whole department of the subject, see MISTAKE.

cannot be impeached, as being against evidence, 326.

variance in duplicate, 330, 331.

recommitment of, see RECOMMITMENT.

*Delivery.*

stipulations for delivery of, 278 *et seq.*

how construed and satisfied, 279, 280.

delivery must be of original, 280.

may be of duplicate, 280.

waiver of actual, 281.

properly made to prevailing party, 282.

demand of, is necessary, 282.

what constitutes, 283.

may be made of an oral, 283.

averring, 283, 284.

availing of non-, 284, 285.

proof of non-, 285.

possession as evidence of, 289.

*Publication.*

publication of, when necessary, 285, 286.

what constitutes, 285-289.

to parties, 288, 289.

must be to each person interested, 289.

*Co-extensive with Submission.*

required to be co-extensive with submission, 340 *et seq.*

by *ita quod* clause, 340, 341.

modern rules of construction, 341.

manifest intent of parties, 342, 343.

nature of subject-matter submitted, 344.

is bad, if not thus co-extensive, 345, 359, 360.

effect of a special exception in the award, 345, 368.

but mention of omitted matter is needless, 359, 360.

cause of defect is immaterial, 346.

**AWARD, — continued.**

- not co-extensive with submission, is not final, 346, 347.
- may be co-extensive by implication, 351.
- method of availing of objection that award is not co-extensive, 361.
  - parol evidence admissible to this point, 361.
  - and evidence of arbitrator, 361.
- not *prima facie* co-extensive, 367.
- presumption that award is co-extensive, see **PRESUMPTION**.
- that matters remain as they are, 347.
- that nothing is due at date of submission, 348.
- of a sum of money, under a general submission, 348, 350, 355.
- need not mention each separate matter, 348, 349.
  - unless required to, by submission, 349.
- may be of a balance in favor of one party, 354, 355.
- of particular thing under a general submission, 350.
- on different pleas in an action, 351.
- not co-extensive, by reason of doing general equity, 352.
- must decide respecting all the parties, 352, 353.
- need not embrace incidental matters, 353, 354.
- nor matters not brought to arbitrator's notice, 355 *et seq.*
  - whether recitals in submission constitute notice, 357-359.
  - notice shown by recitals in award, 359.
- cannot be avoided by party not injured by omission, 360.

*Mutuality.*

- must be mutual, 377.
- old theory of mutuality, 377.
- modern relaxation of rule, 377.
- what now constitutes mutuality, 378, 379.
- ordering releases to be exchanged is mutual, 379.
  - but not if release runs to wrong party, 381.
- ordering payment, whether is mutual, 379.
- word "for" in, creates mutuality, 379, 380.
- not mutual, where submission is by unauthorized agent, 380.
  - where not binding on a party, 381.
- may be, without ordering release by each party, 382.
- not mutual, because not ordering conveyance, 382.
- mutual by implication, 382, 383, 440.
- ordering payment to stranger may be mutual, 383.

*Finality.*

- must be final, 383.
- signification of this requirement, 383, 384, 390, 391.
- to be final, must end litigation, 385.
  - but only as between the parties, 386, 387.
- not co-extensive with submission is not final, 346, 347.
  - (See this division of the topic, *supra*.)
- finding gross sum is, 350.

(See **OFFSET.**)

AWARD, — *continued.*

- seeking to do general equity often is not final, 352.
- embracing all matters notified to arbitrator is final, 356.
- word "for" in, creates finality, 380.
- not directing transfer of property paid for is not final, 386.
- not arranging dissolution of partnership, 386.
- operating for limited time, not final, 387.
- leaving a judicial act to be done, not final, 388, 393.
- reserving judicial power to arbitrator, not final, 388, 389, 396, 473.
  - third person, not final, 393, 397.
  - a party, not final, 394.
- ordering costs to be taxed, is final, 389.
- leaving calculations to be made, may be final, 389-391, 392.
- directing calculation of interest, whether final, 394.
- directing errors of calculation, &c., to be corrected, may be final, 395.
- leaving ministerial act to be done, is final, 391.
- directing legal instruments to be drawn, whether final, 395-398.
- part of, defective in finality, may be separated, 392.
- conditional, whether final, 398.
  - stating condition precedent may be final, 399.
  - leaving to option of party, is not final, 397, 400.
  - conditioned upon future proof, is not final, 400.
    - to be void on happening of event, not final, 401.
- conditional judgment may be entered upon conditional, 401.
- conditioned upon finding of law by Court, is final, 402, 403.
  - arbitrator's authority, is not final, 403.
- in the alternative, is final, 403, 404.
- availing of want of finality, 406.

*Entirety and Possibility.*

- must be "entire," 369.
- force of this phrase, 369.
- can be only one, 370.
  - except in cross-actions, 370.
- one instrument may contain several, 371.
- several instruments may contain one, 371-373.
- may embody extrinsic documents, by reference, 374.
- but must refer to accessible documents and with certainty, 418-420.
- must be complete in itself, to sustain rendition of judgment, 374.
- effect of marginal notes upon, 375.
- special authority to make several, 375.
- if not possible, is bad, 375, 376.
  - nature of possibility required, 376.
- performance of impossible, 558, 559.

(See PERFORMANCE.)

*Certainty.*

- must be certain, 408.

AWARD, — *continued.*

- signification of this requirement, 408.
- uncertainty in an alternative, 405.
- if certain, will be intrinsically enforceable, 409.
- degree of certainty required in, varies, 409.
- if uncertain, is void, 409.
- cases illustrating fatal uncertainty in, 409, 410.
- may be certain by favorable presumption, 411.
- especially if the award be *de et super præmissis*, 413.
- certain in referring to a fact not in dispute, 413.
  - extrinsic proof of such fact, 413.
- only of costs is generally certain by implication, 414, 415, 441, 631.
- ordering payment of costs, is certain, if there be *lis pendens*, 415, 416.
  - but not always, 415.
  - otherwise is uncertain, 416.
  - but must order payment of "costs" specifically, 417.
  - need not specify to whom payable, 418.
- referring to extrinsic documents, whether certain, 418-420.
- certain in naming sum to be paid, 420-422.
  - in leaving it to be calculated, 422.
  - interest to be computed, 422.
  - designating "market price," 423.
- certain in describing debt, 423.
- general, embracing several matters, is certain, 423.
- awarding balance due, is certain, 424.
- not naming time, whether certain, 424, 425.
  - place of payment, is certain, 425, 426.
  - persons by whom act is to be done, how far certain, 426-428.
- how far, need describe real estate by metes and bounds, 428-431.
- following deed, is certain, 431.
- requisite certainty in, defining boundary line, 431, 432.
  - in trespass to realty, 432.
- ordering reassignment of mortgaged lands, is certain, 432.
  - payment from assets, is certain, 434.
  - security, must describe nature and amount, 432, 433.
- that cause be no further prosecuted, 433.
- introducing Statute of Limitations must give date, 434.
- uncertainty in, should be corrected by party, 433, 434.
  - furnishes no ground for bill in equity, 434.
  - as ground for demurrer, 434.
  - as basis for motion, 435.
  - time of objecting for, 435.
  - testimony to explain, 435.
- uncertain as to costs, curable, 631.
  - conditional*, see under *Finality*, *supra*, 642.

AWARD, — *continued.*

*in the alternative*, see under *Finality*, *supra*.

where one alternative is bad, 405.

or impossible, 405.

*Rules of Construction.*

to be liberally construed, 437, 438.

to be construed in connection with submission, 438.

orders of, in excess of authority, treated as explanatory, 439.

aided by manifest implication, 439.

of costs, is good by implication, 441.

in too general language, may be restricted, 441, 442. See 554.

when restriction cannot be made, 442, 443.

ordering concurrent or dependent acts, 445, 446.

concerning boundary lines, rules of construction of, 443-445.

reserving que or Court, narrowly construed, 448.

construction of an inconsistent, 448 *et seq.*

(See PRESUMPTION.)

construction of, ordering payment of rent, 548.

as creating condition precedent, 558.

*Separability.*

separation may be made between good and bad parts of, 453.

when cannot be made, 453.

whether good part need cover all matters submitted,  
454, 455.

may be of reservation of judicial function, 392, 471-  
474.

may be of matters all to be done by same party, 455.

whether may be where something remains awarded on each side,  
455-458.

whether may be of immaterial orders, 459, 460.

order as to costs, 462-464, 627.

cannot be of matter constituting a consideration or condition prece-  
dent, 461, 462.

separability of orders for releases, 462, 465.

payment of a specific sum, 464.

establishing a condition precedent, 464.

as to future conduct of parties, 465, 466.

separability of findings concerning title, 466, 467.

uncertain findings, 466.

findings, void as being in respect of strangers, 467,  
468.

an invalid order for a verdict or judgment, 468,  
469.

orders as to arbitrator's fees, 626.

whether separation may be of orders in, in excess of authority,  
458-461, 470-471.

no separation unless excess is clearly distinguishable, 469, 470.



AWARD, — *continued*.

whether separation may be of reservation of further functions, 392, 471-474.

separation cannot be made, if chief dispute is left undecided, 474.  
for gross amount, generally inseparable, 474-476, 478.

but not always so, 476-478.

separability of, is favored by presumption, 478-480.

Courts seek to uphold, by separation, 480-481.

separability of uncertain part of, 481, 482.

separation of, allowed upon waiver of provisions of bad part, 482.

in alternative, is separable, 483.

performance of bad part of, 483.

separable, may be held under advisement, 484.

rules of pleading and practice in suits upon separable, 484, 485.

*Operation and Effect.*

when, takes effect, 545.

is a final and conclusive judgment, 487.

is good for all time, 487.

in evidence, if valid, is unimpeachable, 488.

is competent evidence under general issue, 488.

not evidence as an account stated, 488.

not proof of assets in hands of executor, 488.

as evidence of title in ejectment, 488.

in evidence, impeachable on proof of non-validity, 488, 489.

equivalent to a decree in equity, 489.

effect of, circumscribed in Chancery, 489.

on illegal matters, is void, 489.

effect of colorable, 489, 490.

under seal, legal character of, 490.

merges and bars the original claim, 490.

exception to principle of merger, 490, 491.

void, effects no bar or merger, 491.

not deciding controversy, effects no bar or merger, 504.

whether, effects bar or merger as to matters submitted but not  
nominated in award, 491 *et seq*.

English rule of conclusiveness in respect of such matters, 491,  
492.

English rule in equity, is doubtful, 494.

as to accidental omissions, 494.

ordering general releases, is conclusive, 493.

rule of conclusiveness, in New York, 495.

where submission is uncertain, 496.  
in Connecticut, 496.

Vermont, 497, 498.

Maine, 499.

New Hampshire, 499.

Massachusetts, 499-504.

**AWARD, — *continued.***

- bars or merges a claim which party refuses to present, 504.
- no bar or merger of claim not matured at date of submission, 504, 505.
- bars or merges only precise matter submitted, 505.
- pleading, in bar to matter not nominated, 505, 506.
- burden of proof under plea of, in bar, 506.
- whether, can be pleaded in bar by party not having performed, 506, 555, 556.
- cannot be pleaded in bar before performance of condition precedent, 507, see 556-558.
- pleadable in bar to bill in equity, 507, 609.
  - whether thus pleadable, if submission is subsequent to filing of bill, 508.
- when may be availed of in set-off, 508, 509.
- when will vest title in personalty, 509, 510.
- reduces chattels of wife into possession, 510, 511.
- does not vest title to realty, 511, 512.
- of commissioners may vest title to realty, 512.
- finding title to realty will sustain action in ejectment, 513.
- legal operation of, determining boundary lines, 513-515.
- finding title or settling boundary, is defence in trespass, 515, 516.
- finding title, not under seal, operates in estoppel, 516.
- oral, as to boundary line, 516, 517.
  - under oral submission, 517.
- simply finding title does not imply order for deed, 518.
- apparently inadequate, operation of, 518.
- inoperative for or against strangers, 203, 519.
- incompetent evidence against strangers, 519.
- sometimes competent evidence for a stranger, 520.
- made operative as against stranger, by his own act, 521.
  - cognizance of submission, 521.
- concerning rights of stranger, is operative as to parties, 522.
- extending time of principal debtor, releases sureties, 522.
- not evidence in criminal prosecution, 524, 525.
- operation of, in *lis pendens*, 525.
  - including extrinsic matters, 526.
- creates a debt provable in bankruptcy, 528, 529.
- becomes cause of action from date of publication, 577.
- recitals in, as evidence, 529.
  - Ratification.*
  - if valid, needs no ratification, 529.
  - if voidable, may be ratified, 530, 532.
    - knowledge required to make ratification valid, 531.
  - if void, cannot be ratified, 532.
  - ratification of, by agent, 532.

**AWARD, — *continued.***

- repudiated, cannot be revived, 532.
  - ratified by performance, 560.
  - effect of misconduct and fraud upon, see **MISCONDUCT**; **FRAUD**.
  - possession or cancellation of, after performance, 561.
- (See **PERFORMANCE**.)

**BANKRUPT,**

- submission by, is void as to estate, 30.
- but may bind himself, 30.

**BANKRUPTCY,**

- of party, effect of on operation of award, 527, 528.
- effect of discharge in, on award, 528.
- award creates a debt provable in, 528, 529.

**BAR,**

- operation of award to effect, see **AWARD**, under division *Operation and Effect*.
- allegations in pleading award in, 589-592.
  - requisites to a good plea of an award in, 591.
- pleading award in, to bill in equity, 609.
  - rules concerning such pleading, 609, 610, 611.

**BOND,**

- of submission, breach of condition to refer or submit, 96.
- action of debt, for penalty of, 582.
- action on, after enlargement of time, 582.
  - by parol, 582.
  - interlineation, 583.
- pleadings in action on, 589, 590.

**BOUNDARIES,**

- questions concerning, may be submitted, 55.
- agreement for survey of, is not submission, 38.
- oral award as to, 51.
- award concerning, need not order release by both parties, 381, 382.
- what is sufficient certainty in award determining, 431, 432.
- rules for construing awards concerning, 443, 444.
  - how far explainable by evidence, 445.
  - presumption in discrepancy between submission and award, 445.
- legal operation of awards concerning, 513-515.
  - oral award concerning, 516, 517.
    - under oral submission, 517.

**CASE,**

- closing too hastily, 145.
- re-opening for new evidence, 145.

**CASE**, — *continued*.

*action of*, when appropriate, on award, 583, 584.

**CERTAINTY**,

in award, see **AWARD**, under division *Certainty*.

instances of, by implication, 253-255.

**COMMISSIONERS**,

acting as arbitrators, 109.

when amenable to court, 109.

**CONCEALMENT**. See **FRAUD**.**CONCLUSIVENESS**,

of award, see **MISTAKE**; **AWARD**; **ARBITRATOR**.

**CONDITION**,

precedent to validity of award, 263.

by the *ita quod* clause, 340 *et seq.*

(See **ITA QUOD CLAUSE**.)

in award, effect of on validity of award, see **AWARD**, under division *Finality*.

effect of on operation of award, see **AWARD**, under division *Operation and Effect*; **PERFORMANCE**.

(See **BOND**.)

**CONSTRUCTION**,

of award, see **AWARD**.

**CONVEYANCE OF REALTY**.

may be ordered by arbitrator, 193.

form of instrument of, should be specified, 194.

order for "good and sufficient deed," 195.

expense of, 195.

when stipulated for in submission, 196.

when award not ordering, is bad, 382.

directions concerning form of, 396, 397.

**CORPORATION**,

may be party to submission, 5.

in what manner may become bound by submission, 5.

may submit by agents or officers, 5, 6.

presumption is in favor of authority of agent or officer, 6.

may be bound by counsel's submission in a cause, 19.

**COSTS**,

may be ordered to be taxed, 389.

force of award only of, 414, 415, 441, 631.

order for payment of, 415, 416,

in reference, 416.

proper form of order for payment of, 417.

distinction between different kinds of, 622, 623, 626, 627.

of a cause, 623.

reference, 623.

implied power of arbitrator concerning, 623.

in a cause, 623, 624.

COSTS, — *continued.*

- power concerning, conferred in the submission, 624.
- arbitrator need give no order concerning, 624.
  - unless directed by the submission, 624, 625.
- arbitrator's discretion concerning, 624, 625.
- may be apportioned, 625.

(See FEES.)

- rules in United States as to power of arbitrator concerning, of arbitration, 627, 628.
- rules in United States as to power of arbitrator concerning, of suit, 628.
- what are, of cause, 629.
- rule as to, in New Hampshire, 629.
- to whom allowed, when not given in award, 629, 630.
- stipulated to abide the event, 626, 630.
- in what shape, may be awarded, 631.
- uncertainty as to, may be cured, 631.
- may be sued for before taxation, 577.
- must be taxed before trial, 577.
- when, need not be taxed, 577.
- one half of, recoverable by party paying, 577.
- notice of taxation of required, 577, 578.
- may be recovered by *assumpsit*, 578.

## COUNSEL.

- submission entered into by, 5.
- employed in cause, may submit, 15, 17.
- whether may submit before suit brought, 16, 17.
- cannot submit title to realty, 16.
- whether may include matters not involved in suit, 16, 17.
- objection to unauthorized submission by, must be promptly made, 17, 18.
- courts seek to uphold submission by, in *lis pendens*, 18.
- formalities requisite to submission by, 18.
- may stipulate in submission for no exception or appeal, 19, 87.
- may bind a corporation client in a cause, 19.
- may enlarge time, 19.
- inference from appearance of, 19.
- notice of intent to employ at hearing, 130.
- arbitrator may refuse to hear, 130.
  - call in, 131.
  - consult, 170.
  - employ, in framing award, 170, 275.
  - but not, of a party, 275.

## COVENANT,

- action of, will lie if submission be by deed, 583.

**DAMAGES,**

- for refusal to fulfil agreement to submit, 95, 96.
- claimable for revoking submission, 238, 239.
- measure of, 239.

**DATE,**

- omission of, in award, 425.

**DEATH,**

- of a party, see PARTY.
- of an arbitrator, revokes submission, 234.

**DEBT,**

- action of, will lie for award of money, 580.
- if other things be included, 580, 581.
- will lie against executor, 580.
- for penalty of bond, 582.
- (See BOND.)

averments in action of, 586.

pleadings in action of, on arbitration bond, 589, 590.

**DEFENCES.** See PLEADING.

in suit on promissory note left with arbitrators, 599.

**DELEGATION,**

- of authority by arbitrator, see ARBITRATOR.
- (See AWARD, under division *Finality*.)

**DELIVERY,**

- of award, see AWARD, heading *Delivery*.
- averring, 586.

**DEMURRER.** See PLEADING.**DISCONTINUANCE,**

- whether effected by submission of a pending cause, 73 *et seq.*
- where submission stipulates for withdrawal of action, 75, 76.
- discontinuance of appeal, 76.
- proceeding after submission has effected a, 76.
- when need be ordered by award, 267, 268.
- is a proper order in an award, 269.
- (See SUBMISSION, 667.)

**EJECTMENT,**

- action in, sustainable by award finding title to realty, 513.

**ENFORCEMENT,**

- of award, by suit, 574.
- way of defence, 574, see BAR; ESTOPPEL.
- judgment, attachment or execution, 574.
- of award returnable to Court, by suit, 575, 576.
- of void statutory award, by suit, 576.
- of award *in pais* must be by suit, 576.
- by suit on an independent agreement to perform an award made pursuant to a void submission, 576.
- method of, need not be named in award, 576.

ENFORCEMENT, — *continued*.

- may be of part of award only, 577.
- by bill in equity, for specific performance, 603, 604.
  - not where there is remedy at law, 603, 604.
- in equity is addressed to discretion of Court, 604.
  - not granted, against justice, 605.
- demurrer to bill for, 608.
- acquiescence not a necessary preliminary to an order for specific performance, 605, 606.
  - but is basis for such order, 606.
- penalty is not substitute for specific performance, 606.
- right to specific performance lost by time, 606.
- no specific performance of illegal orders, 607.
  - unreasonable orders, 607, 608.
- no specific performance against strangers, 608.
- sustaining award by injunction, 608, 609.

## ENTIRETY,

- of award, see AWARD, heading *Entirety*.

## EQUITY, COURT OF

- interference by, on ground of mistake, 321, 323, 329, 332.
  - to avoid award for uncertainty, 434.
- fraud and misconduct are ground for bill of, 543.
- whether will enforce award against infant, 4.
- bill in, for specific performance, see ENFORCEMENT.
- setting award aside by proceedings in, 618-620.
  - (See PLEADING ; PRACTICE.)

## ERRORS,

- clerical, in submission, 85.
- in award*, see AWARD.

## ESTOPPEL,

- operation of award by way of, in matters concerning title to realty,
  - see REALTY ; AWARD, under division of *Operation and Effect*.
- need not always be pleaded, 518.

## EVIDENCE,

- power of arbitrator in respect of, see ARBITRATOR.
- to prove illegal claim is inadmissible, 137.
- test of admissibility of, 137.
- as to matters not submitted, 138.
- rejection of, under mistake, 138.
- admission of incompetent, by referee, 138 *et seq.*
- question of admissibility of, may be left by referee to Court, 140.
- reserving right of objecting to admission of, 141.
- need not be reported, 141.
- arbitrator may refuse to hear, 142 *et seq.*, 536.
  - but incurs danger in so refusing, 143 *et seq.*
- re-opening case to admit new, 145, 146.
- admission of, *de bene esse*, 146, 147.

EVIDENCE, — *continued.*

- of appointment of umpire, 246.
- an award as, see AWARD, under division of *Operation and Effect*.
- oral award as to boundary line as, 517.
- in criminal prosecution award is not, 524.
- to establish an extrinsic fact, 413.
- to explain uncertainty, 435.
- recitals in award as, 529.
- erroneous manner of taking, 536.
- need not be taken in writing, 536.
- award may be given in, in suit on original demand, 590, 591.
- admission of party as, 602.
- (See TESTIMONY.)
- discovery of new, as ground for vacating award on motion, 614-616,
- element of time in this connection, 616, 617.
- (See MOTION.)

## EXCESS,

- of authority by arbitrator*, see ARBITRATOR.
- only party injured can object to, 210.
- method of availing of this objection, 211-213.
- parol evidence of, admissible, 213.
- arbitrators' testimony as to, 214.
- may be ratified, 530.
- reduction of, 554, see 441, 442.

## EXECUTORS AND ADMINISTRATORS,

- may submit on behalf of the estate, 19.
- otherwise, however, in Louisiana, 20.
- whether submission by, is an admission of assets, 20 *et seq.*
- personal liability of, entering into submission, 20 *et seq.*
- by way of *devastavit*, 22, 23.
- proper form and contents of submission by, 23.
- cannot submit with widow, 24.
- of different estates submitting claims of same party against each, 24.
- submission by executor of matters in which he is personally interested, 24.
- administrator cannot submit as to realty, 25.

## EX PARTE,

- Proceedings*, see ARBITRATOR; HEARING.
- Communications*, receipt of is misconduct, 534, 535.
- hearing statement when asked to act is not such receipt of, 535.

## FEES,

- of arbitrators*, how affected by separating the award, 483.
- when to be paid equally by parties, 577.
- customarily paid before delivery of award, 625.
- whether should be named in award, 625, 626.
- order concerning, may be separated, 626.



FEES, — *continued.*

order concerning how far enforceable, 626.

## FINALITY,

of award, see AWARD.

## FRAUD,

of arbitrator, fatal to award, 539.

how far erroneous or excessive award is evidence of, 539.

of party, in procuring award, is fatal, 540.

what constitutes, of party, 540.

whether concealment is, 540, 541.

question of, is of fact for jury, 541.

how may be brought before Court, 541, 542.

nature of presumption of, 541.

how must be pleaded, 541, 542.

remedy for, is by bill in equity, 543.

answering allegations of, 544.

is not defence in suit at law, 542.

of party, is defence in suit at law, 544.

averring, 587.

pleading, 595, 596.

in procuring submission, pleading and proving, 602.

## GUARDIAN,

of infant, may submit for ward, 25.

may bind himself personally, 25.

if also parent, may combine his own claims in demand for damages for injury to child, 25.

*ad litem*, cannot submit, 25.

of lunatic, may submit, 26.

limitation on power of, to submit, 26.

submission concerning realty, 57.

## HEARING,

proceedings at, controlled by arbitrator, 115.

time and place of, appointed by arbitrator, 116.

appointment revocable by arbitrator, 120.

parties entitled to be present at, 117.

notice of, must be served on party, 117.

by whom must be served, 117, 118.

in what cases necessary, 118, 119, 123, 125.

not given to surety, 119.

to attorney is sufficient, 119.

what is sufficient, 120.

time of giving, 120.

may be waived, 121.

what constitutes waiver of, 121.

HEARING, — *continued*.

- notice of, availing of insufficient, 121.
    - whether need be averred, 124.
    - will be presumed, 124.
  - non-attendance of party at, 121.
  - ex parte*, in case of non-attendance of party, 121 *et seq.*
    - generally objectionable, 126.
    - not excused by motives of arbitrator, 126.
    - nor by irregularity of other party, 127.
    - excusable instances of, 127.
    - assent of party to, 128.
    - duty of party objecting to, 129.
    - curing objection on ground of, 129.
  - exclusion of party from, 128.
  - attendance of counsel at, 129-131.
- (See COUNSEL.)

## IMPLICATION. See AWARD; CERTAINTY.

- award may be co-extensive with submission by, 351.
  - mutual by, 382, 383, 440.
- allowed in construing award, 439-441.
- arising from award of costs only, 414, 415, 441.

## INFANT,

- submission by, is void or voidable, 4.
  - whether award will be enforced in equity against, 4.
  - ratification of voidable award as to, 531.
- (See GUARDIAN.)

## INJUNCTION,

- award sustained by, 608, 609.

## INTEREST,

- recoverable in suit on award, 584.
- begins to run from demand, 584.
- recoverable only in an action, 584.

## ITA QUOD CLAUSE,

- requires award to be co-extensive with submission, 340.
  - still retains its old force, 341.
  - in a measure superseded by modern rules of construction, 341.
- (See AWARD.)

## JUDGMENT,

- separability of invalid order for, 468-469.
- enforcing award by, 574.

## MARRIAGE,

- of *feme sole* revokes submission, 235.

## MARRIED WOMAN,

- how far may bind herself by submission, 26.
- be bound by husband's submission, 27.

**MARRIED WOMAN, — continued.**

- may submit as to her separate property, 27.
- should be joined by husband in submission as to realty, 27, 28.
- may submit in some cases under the old English law, 28.
- submission by husband of, may be affected by award, 28, 29.
- presumptions and burden of proof in submission by, 29.

**MERGER,**

- effected by award, see **AWARD**, under division of *Operation and Effect*.

**MISCONDUCT,**

- of arbitrator, see **ARBITRATOR**, *passim*.
- demonstration of partiality is, 532.
- appearance of partiality is, 533.
- receiving *ex parte* communications is, 534, 535.
- relying wholly on statement of party is, 535.
- unreasonable refusal of evidence is, 536.
- refusing to take evidence in writing is not, 536.
- receiving evidence in wrong form may be, 536.
- refusing postponement may be, 536.
- taking money is, 536.
- buying claim is, 536.
- private agreement with party is, 536.
- of one of several arbitrators is fatal, 537.
- what irregularity in conducting proceedings is, 537, 538.
- permissive, 538.
- in acting upon Sunday, 538.
- mistake treated as, 323, 538, 539.
- (See **MISTAKE**.)
- question of, is one of fact for jury, 541.
- how may be availed of, 541-544.
- (See **PLEADING, PRACTICE**.)
- answering allegations of, 544.
- pleading, 595, 596.

**MISTAKE,**

- in award, power of arbitrator to correct, 228, 229.
- by arbitrator, inconsistency of decisions as to effect of, 292.
  - two classes of decisions, 292, 293.
  - doctrine that award is conclusive in spite of, 293-296, 297.
  - cases concerning, in matter of law, 297-299.
  - exception to general rule in matters of law, 299, 300.
    - cases covered by, 300.
  - general rule affected by stipulations in the submission, where award is required to accord with law, 300-303.
  - construction of such stipulations, 301.
  - power given by award to Court to interfere for, 303
  - et seq.*

MISTAKE, — *continued*.

- how such power may be given, 304 *et seq.*
  - by statement of intent to be governed by law, 305, 306.
  - by stating grounds of decision, 307–310.
    - statement must be embodied in award, 309, 312, 313.
    - rule in England, 310.
    - suggestion of a distinction, concerning effect of stating grounds, 311.
    - not, by statement of facts, 311, 312.
      - question is of arbitrator's intent, 313, 314.
- under submission of question of pure law, immaterial, 314.
- whether by professional or non-professional arbitrator, immaterial, 315.
- in matter of fact, effect of, 316 *et seq.*
  - where, prevents fair exercise of judgment, 316–320.
- by arbitrator concerning contents of award, 320.
- in law or fact, held in some cases a ground for vacating the award, 320 *et seq.*
  - character of tribunals asserting this doctrine, 321.
    - interference of equity, 321.
  - acknowledged by arbitrator, 323, 324, 325, 329.
  - construed as misconduct, 324.
  - acknowledged by referee, 329.
  - by arbitrator, on his own principles, 326.
  - in the nature of clerical errors, miscalculations, &c., 326–330.
    - must appear on face of award, 329.
    - or be acknowledged, 329.
    - corrected by recommitment, 333.
  - cannot be corrected by Court, 330, see 328.
  - by variance in duplicate awards, 330, 331.
  - whether available in defence in suit at law, 331, 332.
    - on motion to set aside award, 332.
  - by recommitment, 333.
    - (See RECOMMITMENT.)
  - evidence of, not apparent on face of award, 336 *et seq.*
  - testimony of arbitrator to show, 336, 337.
  - promise to correct, 338.
  - pleading, 595, 596.

## MOTION,

- vacating award by, 611 *et seq.*
  - when proper, 611 *et seq.*
- proceedings upon, 612.
- on ground of misconduct, fraud, or partiality, 612, 613.
- not allowable if award be wholly void, 613, 614.
- must be in open court, 614.

MOTION, — *continued.*

- discovery of new matter may be ground of, 614-616.
- but is not always so, 614, 615.
- affidavits as to such discovery, 615.

MUTUALITY,

- is wanting where infant is party, 5.
- (See AWARD, under division *Mutuality.*)

NONSUIT,

- effect of an award ordering, 269.

NOTE,

- award by promissory, of party, 269 *et seq.*
- character of such a, 270, 271.
- generally valid, 272.
- but invalid if award be void, 272, 273.
- recovery back after payment of invalid, 273.
- defences to such a, 599.

NOTICE,

- of hearing, see HEARING.
- pleading concerning, 124.
- presumption concerning, 124.
- availing of want of, 124, 125.
- of intent to employ counsel at hearing, 129, 130.
- of revocation, 231.
- of award is needless, 290.
- when should be averred, 588.

OATH,

- by arbitrator unnecessary, at common law, 100.
- required by statute, 110, 111.
- omission of, 111, 112.
- form of, 112.
- dispensed with by parties, 112.
- presumption as to, 112.
- need not be averred, 113.
- whether omission of, can be shown collaterally, 113.
- of umpire, 113.
- of witnesses, power of arbitrator to administer, 131.
- referee to administer, 131.
- administered by magistrate, 132.
- when imperatively required, 132.
- unauthorized administration of, 132.
- waiver of, by parties, 133.
- form of, 134.

OFFSET,

- power of arbitrator to admit matters in, 209.
- award must specify amount of, 351.

OFFSET, — *continued*.

when award may be pleaded in, 508, 509.

## OVERSEERS OF THE POOR,

power of, to submit claims of pauper, 7.

## PARTNERS,

generally held not to be able to bind each other by submission, 7.

but may be authorized to do so, either directly or inferentially, 8, 12.

one, may bind only himself, 8, 9.

one not bound by submission or award may yet be concluded by execution of the award, 9.

whether one authorized to sue, can therefore submit, 9, 10.

power of arbitrator in disputes between, 186 *et seq*.

(See ARBITRATOR.)

death of one, 233.

award not arranging dissolution between, 386.

what constitutes sufficient arrangement of dissolution between, 387.

## PARTNERSHIP. See PARTNERS.

certainty in award settling, 411.

## PARTY,

who may be, to submission, 3, 4.

really in interest must be joined in submission, 29.

each, of record, must join in submission of suit, 33.

under duress cannot submit, 33.

(See SUBMISSION.)

generally entitled to notice of hearing, 117.

(See HEARING.)

when not entitled, 123, 125.

non-attendance by, 121 *et seq*.

entitled to time to examine evidence, 123, 124.

effect of admissions by, 128.

is competent witness, 141.

death of a, revokes submission, 233.

after award made, 234.

lunacy of a, revokes submission, 235.

reservation of judicial power to, avoids award, 394.

performance by representatives of deceased, 553.

## PERFORMANCE.

of award, is waiver of precedent defects, 174, 175.

of inoperative orders in award, 483.

as preliminary to right to plead award in bar, 506, 590–592.

of condition precedent before pleading award in bar, 507.

when duty of, accrues, 545, 546.

colorable, is bad, 546.

according to intent, is sufficient, 547.

reasonable intent, is sufficient, 547.

how made of award ordering payment, 548.

**PERFORMANCE, — *continued.***

- of award ordering payment of rent, 548.
  - suit to cease, 549, 554.
  - party not to prosecute, 549.
  - execution of deed, 549.
  - by whom deed must be prepared, 549–551.
- whether request for, is necessary, 552.
- request for, if made, must follow award, 552.
  - may be made by agent, 553.
- obligation of, created by tender, 553.
- to a stranger, 553.
- to and by representatives of deceased party, 553.
- of award in excess of authority, 554, see 441, 442.
  - ordering indemnity, 554.
  - acquittance, 554.
- not always necessary as preliminary to suit, 555, 556.
- necessary, before suit brought, of dependent or concurrent orders or
  - of conditions precedent, 507, 556–558.
- when made condition precedent, 558,
- of impossible orders, not required, 559.
  - where impossibility results from act of party, 559.
- of award in alternative, 560.
- of unenforceable orders, 560.
- need not be by arbitrators in person, 560.
- status* of the award after, 561.
- delivery of security for, 561.
- pleading, in defence, 597.
- specific, see ENFORCEMENT.

**PLEADING,**

- pendency of arbitration at time of suit brought should be pleaded in abatement, 79.
- concerning oath of arbitrator, 113.
  - notice of hearing, 124.
- excess of authority, 211–213.
- revocation, 239.
- concerning delivery of award, 283, 284, 285.
  - uncertainty in award, 434, 435.
- where separation of the good part of the award from the bad part is sought, 484.
- award in bar to matter not nominated in it, 505, 506.
  - (See AWARD, under division of *Operation and Effect*.)
- estoppel by award need not always be pleaded, 518.
- fraud or misconduct is not subject of demurrer, 541.
  - are personal charges, 541.
  - cannot be pleaded in defence, 542.
  - are ground for bill in equity, 543.

PLEADING, — *continued*.

- in answer to allegations of fraud or misconduct, 544.
  - fraud of party is defence in suit at law, 544.
  - count for revocation may be joined with count on award, 583.
  - what averments are necessary in pleading an award, 584-587.
    - in setting out the submission, 584.
      - nature of controversy, 586.
    - in averring order of court, 585,
      - readiness in time, 585, 586.
      - appointment of third arbitrator, 585.
      - delivery, 586.
      - invalidity, 586.
      - request of performance, 589.
      - fraud or misconduct, 587.
      - notice, 588.
      - demand, 588, 589.
  - what averments are needed in setting forth the award, 587.
    - part only of the award, 588.
    - parol award, 589.
  - no *proferet* of award is needed, 588.
  - plea of "no award," 592-595.
    - that all matters are not decided, 595.
    - of fraud, misconduct or mistake, 595, 596.
      - illegality in the matter submitted, 596, 597.
      - performance, 597.
      - statute of limitations, 597, 598.
      - revocation of submission, 598.
      - marriage of *feme sole*, 598.
      - oral waiver, 598.
      - oral alteration, 598.
  - plea that award was not ready, 599.
    - cause of action was not submitted, 599.
  - when a demurrer is proper, 599, 600.
  - demurrer to bill for specific performance, 608.
  - contents of bill to set aside award, 620.
    - demurrer to such bill, 620.
  - making an arbitrator a defendant in such bill, 620, 621.
- (See ASSUMPSIT; DEBT; CASE; COVENANT, &c.)

## PRACTICE,

- how to avail of want of notice of hearing, 124, 125.
- availing of objection that all arbitrators did not act together, 154.
- discharging rule of reference on withdrawal of a referee, 160.
- method of availing of objection of excess of authority, 211-213.
  - non-delivery of award, 284, 285.
  - that award is not co-extensive with submission, 361.
  - want of finality, 406.



PRACTICE, — *continued.*

- method of availing of want of certainty, 434, 435.
- where the good and bad parts of the award are to be separated, 484, 485.
- burden of proof under plea of award in bar, 506.
- execution of the submission if denied must be proved, 600.
  - what is sufficient proof of, 600.
  - if submission be lost, 601.
    - ruled out, 602.
  - by evidence of part performance, 502.
    - admission of party, 502.
- pleading and proving fraud in procuring submission, 602.
- setting aside award on motion, see MOTION.
- (See ASSUMPSIT; DEBT; CASE; COVENANT, &c.)

## PRESUMPTION,

- is in favor of authority of agent making a submission, 6.
  - regularity of statutory submissions, 48, 49.
- that all claims submitted have been presented, 79.
- that oath was administered to arbitrator, 112.
- that notice of hearing was given, 124.
- that all the arbitrators acted together, 161.
- that arbitrator has not exceeded his authority, 179.
- to sustain award as to future action of parties, 201.
- of arbitrator's performance of condition precedent, 277.
- of readiness of award for delivery, 279, 283, 284.
- as to award of particular thing under general submission, 350.
- that award is co-extensive with submission, 348, 350, 362.
  - where award purports to be *de et super præmissis*, 362.
  - is not conclusive, 363.
    - but shifts burden of proof on impeaching party, 363.
- cases showing rule of favorable, 363 *et seq.*
- in doubtful cases, 365.
- favorable, not always admitted, 365.
- always in favor of validity of award, 446, 447.
- that arbitrators have performed their duty accurately, 447.
- limitations upon the rule of favorable, 448.
- that award does not decide matters not submitted, 367.
- arising out of award of general releases, 367, 368.
- of the existence of facts establishing certainty in an award, 411, 412.
  - strengthened, if award be *de et super præmissis*, 412.
- in award concerning boundaries, 444.
  - where award and submission differ, 445.
- favorable will be made to aid separability of award, 478-480.
- of fraud, 539, 540, 541.
- to aid award uncertain as to costs, 631.

## PUBLICATION,

- of award, see AWARD.

## RATIFICATION,

- of submission made by unauthorized agent, 13.
- is made by acting on the award, 13.
  - allowing proceedings to continue, 14.
- cannot be made by agent to submit, 15.
- of award, 529-532.

(See AWARD, under division *Ratification*.)

## REALTY,

- questions concerning title to, may be submitted, 54, 55.
  - but not in New York, by statute, 55.
- award concerning, of religious corporation, 4.
- submission of value of, taken by railroad company, 5.
- submission as to, does not bind vendee without notice, 14.
- title to, cannot be submitted by counsel, 16.
  - administrator, 25.
- submissions concerning title to, are nicely construed, 55 *et seq.*
- conveyance of, may be ordered by arbitrator, 193, 194.
  - (See CONVEYANCE.)
- award disposing of interest in, must be in writing, 257, 258.
- with what degree of certainty award must describe, 428-431.
- title to, not vested by award, 511, 512.
- award confirming title of, does not require deed, 518.
- by whom deed of, is to be prepared, 549, 551.
- specific performance of awards concerning, 603, 604.

## RECOMMITMENT,

- extending referee's authority by, 224.
- to correct acknowledged error, 329.
  - clerical error, 333.
- for substantial alteration, 333.
  - formal alteration, 334.
  - ascertaining costs, 334.
- functions of arbitrator after, 334, 335.
- granting, is in discretion of Court, 335.
- must generally be of whole case, 335, 336.

## REFeree,

- substitution of new, 84.
- judge cannot appoint himself, 105.
- action of, in admitting or rejecting evidence, see EVIDENCE.
- applications to, for adjournment, 148.

(See ADJOURNMENT.)

- mandamus* to compel, to proceed, 160.
- majority of, may report, 164.
- authority of, extended as to time by a recommitment, 224.
- need not report evidence, 278.

(See ARBITRATOR, *passim*.)

REFERENCE, *in lis pendens*.

- wherein different from submission, 49.

REFERENCE, — *continued.*

- confusion between the two, 49.
- construed to be, by phraseology, 69.
- general submission cannot be made a, without consent, 49.
- will not discharge bail, 81.
- may be changed into submission by acts of parties, 68.
- of matters not properly referrible, 68, 69.
- in cross actions, 81.
- power of arbitrator in, 205.
- substitution of new referee in, 84.
- enlargement of rule of, 85.
- by rule of Court, irrevocable, 232.

(See ARBITRATION; AWARD; SUBMISSION, *passim.*)

## REFUSAL,

- to act, see ARBITRATOR.
- to perform preliminary acts, 236, 237.

## RELEASE,

- may be ordered by arbitrator, 192.
- too extensive, may be cut down, 192.
- bad orders for, 193.
- form and time need not be designated, 193.
- when need not be ordered in award, 267.
- effect on construction of award of ordering general, 367, 368.
  - conclusiveness of award, of ordering general, 493.
- order for exchange of, makes award mutual, 379.
  - but not if release runs wrongly, 381.
- construction of orders concerning, in the matter of separability, 462, 465.
- may be executed to a stranger, 553.
- execution of mutual, does not preclude inquiry into validity of award, 619.

## REPORT,

- time for returning, 225.
- effect of setting aside, 338.
  - vacating *in lis pendens*, 619.

## RESTRICTION,

- of language of award, 441, 442.
- when not allowed, 442, 443.

## REVOCATION,

- of time set for hearing, 120.
- by reason of delay of arbitrator, 225.
- in fact and in law, 229.
- time of making, 230.
- stipulation that submission shall be irrevocable, 230.
- by one of several who jointly constitute one party, 230.
- by consent of all concerned, 231.
- must be notified to arbitrators, 231.

REVOCAION, — *continued*.

- when cannot be lawfully made, 231, 232.
- none, of reference by rule of Court, 232.
- formality requisite to valid, 232, 233.
- by death of party, 233, 234.
  - one of several persons constituting one party, 234.
  - arbitrator, 234, 235.
- by marriage of *feme sole*, 235.
  - lunacy of a party, 235.
  - arbitrator's refusal to act, 236.
  - institution of suit, 236.
  - neglect to perform necessary preliminaries, 236, 237.
  - a stranger, 238.
  - Congress, 238.
  - agent, 238.
- damages may be claimed for, 238, 239.
- pleading, 239.
- pro tanto*, by withdrawal of some matters, 343.
  - what constitutes such withdrawal, 343.
- count for, may be joined with count on award, 583.
- pleading, 598.

## RULE OF COURT. See SUBMISSION; REFERENCE.

## SEAL. See SUBMISSION.

- not needed on award, 259.
- unless required by submission, 261.

## SECURITY,

- must be certainly described in award ordering it, 432, 433.
- separability of order for, 457, 458.
- for performance of award, 561.

## SELECTMEN.

- power of, to submit for town, 6.

## SEPARABILITY,

- of award, see AWARD.

## SET-OFF. See OFFSET.

## SETTING ASIDE. See MOTION; PRACTICE; PLEADING; EQUITY.

## SPECIFIC PERFORMANCE. See ENFORCEMENT.

## STATUTES,

- concerning arbitrations do not abrogate common law right of submission, 43.
  - but otherwise in New York, 43.
- submissions defective under, may sometimes be upheld as good at common law, 44.
  - but not always, 48.
- construction of certain requirements of, as material or immaterial, 44 *et seq.*
- presumption is in favor of conformity with requirements of, 48, 49.

STATUTES, — *continued*.

specifying subject-matter of submission, liberally construed, 57-59.  
award under, see AWARD.

## STRANGER,

to submission, is beyond arbitrator's authority, 202 *et seq.*  
orders for advantage of, may be good, 203.  
order that act be done by, is generally void, 203.  
but not always, 203, 204.

requiring party to procure acts to be done by, 204.  
award ordering payment to, may be mutual, 383.  
reservation of judicial power to, avoids award, 393, 397.  
operation of award in respect of, 519-522.

(See AWARD, under division *Operation and Effect*.)  
may acquire rights under award by assignment, 523, 524.  
no specific performance by, 608.

## SUBMISSION,

is a contract, 3, 36.  
definition of, 36.  
parties to, must be competent to contract, 3.  
must have power over subject-matter, 3, 4.  
by an infant is void, or voidable, 4.  
corporation may be party to, 5.  
manner in which corporation may become party to, 5, 6.  
by counsel, see COUNSEL.  
selectmen, 6,  
overseers of the poor, 7.  
partners, 7 *et seq.*

(See PARTNERS.)

by agent, 10 *et seq.*

(See AGENT.)

by owner of realty does not bind his vendee without notice, 14.  
executors and administrators, 19 *et seq.*

(See E. and A.)

guardian, 25 *et seq.*

(See GUARDIAN.)

married woman, see MARRIED WOMAN.

husband, see MARRIED WOMAN.

United States District Attorney, 30.

assignees in bankruptcy, 30.

bankrupt, 30.

by persons having joint interests, 31.

parties really in interest should be joined with the nominal parties  
in a, 29.

all parties to the record must join in, of suit, 33.

by divers persons of the one part, construed severally, 31.

may bind some and not others of persons engaging severally, 31, 32.

several bonds may create but one, 32.

SUBMISSION, — *continued.*

- may bind those who sign, though some named do not sign, 32, 33.
- by party under duress is invalid, 33.
- what furnishes sufficient basis for, 36.
- only matters inherently doubtful can be subject of, 36 *et seq.*
  - not making up accounts, 37.
  - or estimating work, 37, 38.
  - or surveying boundary lines, 38.
- reference "to see whether" work is done, is not, 39.
- how far agreements for appraisals are, 39 *et seq.*
  - certain distinctions, 41.
- appeal to recollection is not, 43.
- may be at common law or statutory, 43.
  - the two forms are collateral, 43.
- defective statutory, may be good at common law, 44.
  - but not if defect be substantial, 46.
  - and some Courts' refuse to do this, 48.
  - what defects are or are not substantial, 44-47.
- degree of particularity in statutory, 47.
- effect of superfluous formality in statutory, 47.
- courts seek to uphold statutory, according to apparent intent, 47.
- presumption is in favor of validity of statutory, 48, 49.
- statutory may contain stipulations in addition to statute, 72.
- by order of Court, see REFERENCE.
- may be oral, written, and under seal or not, 50.
- oral, are generally valid, 50, 52.
  - but not if contract as to subject-matter must be in writing, 50.
- when must be in writing, 50, 51.
- when seal is needed upon, 51.
- verbal, of claim for dower, is good, 52.
- no formalities required in, 52.
- implies agreement to abide by award, 52.
- must be certain, 53.
- but if uncertain may be cured by award, 53.
  - deficiency will be supplied, if possible, 61-63.
- bad in itself may be cured by conduct of parties, 63.
- may be by indenture, 53.
  - or by bond, 53.
- all civil matters are a subject of, 53.
- criminal or illegal matters not generally a subject of, 53.
- dower is subject of, 54.
- divorce suit is subject of, 29.
- owelty of partition is subject of, 54.
- ejectment suit is subject of, 54.
- single item may be subject of, 54.
- whether actions on penal statutes may be subject of, 54.
- questions of pure law may be subject of, 54.

SUBMISSION, — *continued.*

- future rights may be subject of, 54.
- questions concerning real estate may be subject of, 54.
  - statute to the contrary in New York, 55.
- boundary lines may be subject of, 55.
- concerning title to realty, nicely construed, 55-57.
- construction of statutes concerning, see STATUTE.
- will be comprehensively construed, 59, 60.
- but will not be stretched by forced construction, 64.
- of "a claim," 60.
- documents to be considered in construing, 61.
- requiring act to be done under direction of arbitrator, 60.
- in writing, invariable by parol evidence, 63.
  - supersedes prior agreement, 63.
- priority in a duplex agreement of, 65.
- extent of a general, 65-67.
- general, does not include old and settled disputes, 66.
- substantial fulfilment of conditional, 67.
- effect of fulfilling condition of, 67.
- construed as conditional, 67.
- of a cause*, 69.
  - extent of, 70.
  - includes all possible amendments, 70.
  - involving examination of account, 71.
  - operation on previous errors, &c., 71.
  - may be extended to alien matters, 72.
  - so extended, does not relate back, 72.
  - effect on jurisdiction of Court, 72, 73 *et seq.*
  - in separate actions, 72, 73.
  - whether works discontinuance, 73 *et seq.*
  - (See DISCONTINUANCE.)
  - interrupts the power of the court, *pro tempore*, 76, 77.
  - takes away power of court as to costs, 77.
  - when takes away right to appeal, 78.
  - when supersedes power of court, 78.
  - irregularity prior to, 78.
  - effect of, on right of action, 79.
- making, a rule of court, 80.
- alteration of*, 81.
  - oral, 81.
  - alteration of* written, 82.
    - by specialty, 82, 83.
    - by extending time named, 83, 84.
    - (See TIME.)
  - withdrawal of some matters, 843.
  - (See REVOCATION.)
  - by substituting new arbitrator, 85.

SUBMISSION, — *continued.*

- suit upon, after alteration, 85.
- clerical errors in, 85.
- how long remains in force, 86.
- not binding a party, fails also as to others, 86.
- containing stipulation not to appeal, 86, 87.
  - revoke, 230.
  - to abide by award, 87.
- scope of, in certain cases, 181–184.
- ceasing to bind a party, 240.
- reservation in, requiring award to be according to law, 300–303.
- containing *ita quod* clause, 340, 341.
- proving execution of, 600.

(See PRACTICE.)

## SUBSTITUTE,

- appearing and proceeding before, 172.
- arbitrator's power to name, 205, 206.

## SUIT,

- on award, performance as preliminary to, see PERFORMANCE.
- award as basis of, 574.

(See ENFORCEMENT.)

- may be brought immediately after publication, 577.
- for costs before taxation, 577.

(See COSTS.)

## SUNDAY,

- award made on, is void, 538.
- order for payment on, is good, 538.

## SURETY,

- not entitled to notice of hearing, 119.
- released by award extending time, 522.

## TENDER,

- under award, creates duty of performance in return, 553.

## TESTIMONY,

*Of Arbitrator.*

- to show mistake in award, 336, 337, 570.
  - award not co-extensive with submission, 361.
  - correct uncertainty, 435.
- inadmissible to alter, correct, or explain award, 562, 563.
- as to extrinsic facts, admissible, 564, 565.
  - grounds of decision, inadmissible, 565, 566.
    - cannot be compelled, 569.
  - admissions by a party, 566, 567.
- incompetent to show non-concurrence in award, 568.
- incompetent to show misunderstanding of contents of award, 568.
- admissible in case of fraud, 570.
  - as to proceedings, 570, 571.



TESTIMONY, — *continued.*

- admissible as to what was presented, 571.
  - in difference, 572.
  - making of parol submission, 572.
- of party, as to what was submitted, 599. See EVIDENCE.

TIME,

- enlargement of by counsel, 19.
  - presumed from appearance of counsel, 19.
- extension of, named, 83, 84.
  - by acts of parties, 84, 224.
  - by recommitment, 224.
  - acknowledgment of submission after, 84.
- of hearing, see HEARING.
- waiver of stipulations as to, 173.
- construction of language concerning, 225.
- reasonable, allowed where none is named, 225.
- award invalid unless made within named, 261.
- effect of not naming, of performance, in award, 424, 425.
- in respect of concurrent or interchangeable acts, 445.
- in connection with discovery of new evidence, 616, 617.

TITLE,

- to personalty, effect of award to vest, 509, 510.
  - to wife's chattels, effect of award to vest, 510, 511.
  - to realty, effect of award to vest, 511, 512.
    - by award of commissioners, 512.
- (See REALTY.)

TRESPASS,

- award finding title or settling boundary is defence in, 515, 516.

UMPIRE,

- differs from a third arbitrator, 241.
- power to choose, 242.
- unauthorized choice of, 242.
- how to be appointed, 242, 243.
- at what time may be chosen, 243, 244.
- appointment of, does not conclude arbitrator's authority, 244, 245.
- source of power to appoint an, 245.
- nomination of substitute, 245.
- appointment of, by parol, 245.
- evidence of appointment of, 246.
- duty of, to re-hear case, 246 *et seq.*
- submission to "two and their," 248.

VALUATION,

- making, is a judicial act, 392.

VERDICT,

- separability of an invalid order for, 468, 469.

## WAIVER,

- of previous errors, &c., in a cause, by submission, 71.
- of right of appeal or exception, 86, 87.
- of objections to competency of arbitrator, 102, 103.
  - by reason of attorney's knowledge, 104.
- of notice, 121.
  - what constitutes, 121.
- of objection to *ex parte* examination, 129.
- of oath of witness, 133.
- of irregularities in proceedings before arbitrator, 171.
  - must be accompanied by knowledge, 171.
  - by appearing and proceeding, 171 *et seq.*
  - not always thus effected, 173 *et seq.*
  - by silence, 172.
- of defective execution of bond of submission, 172.
- of stipulations as to time, 173, 224.
- is a question of intention, 173.
- of stipulations as to form of award, 174.
- of all precedent defects, by performance of award, 174.
- of a departure from the scope of the submission, 175.
- of unauthorized choice of umpire, 242.
- of strict compliance with statutes as to award, 264.
- of actual delivery of award, 281.
- of beneficial provisions in bad part of award, 482.
- pleading oral, of submission, 598.

## WITNESS,

- oath of, see OATH.
- forcing attendance of, 134.
- when protected, like a witness *in his pendens*, 134.
  - extent of such protection, 134.
- party, or person interested, may be, 141.
- admission of an incompetent, 142.
- number of, may be limited by arbitrator, 144.
  - (See ARBITRATOR.)
- death of, during adjournment, 149.
- not needed upon award, 259.
  - unless required by submission, 261.







